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ABSTRACT

Hearings are presented on the Collegiate Student-Athlete Protection Act of 1983, a bill designed to encourage college student-athletes to complete their undergraduate education before becoming professional athletes. This legislation addresses the relationship between professional sports league eligibility rules and the antitrust laws. The eligibility requirements are based on elapsed time from high school graduation. The legislation makes clear that professional sports leagues and associations have the legal authority to promulgate rules regarding recruiting and eligibility without being faced with antitrust charges. The proposed legislation was prompted by the signing of the University of Georgia's football star, Herschel Walker, by a member team of the United States Football League. The scope of the hearings is confined to the public policy issue of whether antitrust laws should bar professional teams from policing themselves. The effect, however, is a broader public policy issue--whether college athletes will, at the least, be free from pressure to abandon their education. While Congress cannot force athletes to follow this course, it can provide the most favorable environment for doing so. Witnesses include representatives of professional leagues and associations, athletes, and a sports attorney. (SW)

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S. HRG. 98-378

THE COLLEGIATE STUDENT-ATHLETE PROTECTION ACT OF 1983

ED240962

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 610

A BILL DESIGNED TO ENCOURAGE COLLEGE STUDENT-ATHLETES TO COMPLETE THEIR UNDERGRADUATE EDUCATION BEFORE BECOMING PROFESSIONAL ATHLETES

MARCH 17 and MAY 23, 1983

Serial No. J-98-20

Printed for the use of the Committee on the Judiciary

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THE COLLEGIATE STUDENT-ATHLETE PROTECTION ACT OF 1983

THURSDAY, MARCH 17, 1983

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:30 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Present: Senators Thurmond, Specter, and DeConcini.

Staff Present: W. Stephen Cannon, chief counsel for antitrust; March Tiffany, chief economist and counsel for antitrust; and Bruce A. Cohen and Stephen P. Johnson, counsels to Senator Specter.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. Today the committee begins hearings on S. 610, the Collegiate Student-Athlete Protection Act of 1983. This legislation, sponsored by the distinguished Senator from Pennsylvania, Mr. Specter, addresses the relationship between professional sports league eligibility rules and the antitrust laws.

The question of whether the antitrust laws prohibit professional league eligibility requirements based on elapsed time from high school graduation has been a subject of great interest over the years and has been addressed by the Federal courts. Recent events have only added to this debate.

S. 610 would provide antitrust immunity to any professional sports league entering into any agreement designed to encourage college student athletes to complete their undergraduate education before becoming professional athletes. Without doubt, major policy questions are raised by this provision, and it is the duty of this committee to examine S. 610 thoroughly.

We are fortunate to have a broad array of distinguished witnesses and look forward to hearing their testimony today.

I might say I have a conflict and cannot be here for the full hearing, but I shall take a deep interest in this matter. We appreciate all those who have come today. We feel we have some of the most prominent people in the athletic field scheduled today to testify. And you testimony will be very helpful to this committee.

We thank you for coming. We thank you for your presentations, and I am going to now turn the hearing over to the distinguished Senator from Pennsylvnia, Mr. Specter, and he will take charge of the hearing and go forward with it.

6

Senator, I believe the first witness today is Joe Paterno, who happens to be the head football coach of this year's champion college football team I believe. My alma mater, Clemson, was national champion a couple of years ago. [Laughter.]

We are delighted to have all of you here today, and we hope you enjoy your visit to the Capitol. Any time you are around the Capitol, we want you to come by and say hello to us and feel at home.

I am a great believer in athletics, and I want to commend all of you for taking such an active part in athletics. It is a wonderful thing for the young people to participate in sports. It teaches them good sportsmanship. It develops them physically and mentally and has many assets, to my way of thinking.

I will now turn the hearing over to Senator Specter.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER [presiding]. Thank you very much, Mr. Chairman. Before the chairman leaves, I want to thank him, and to commend him for arranging these hearings on such a prompt basis because of the tremendous interest in this subject. And I also want to thank Senator Thurmond, whose home State, South Carolina, produced the No. 1 college football team last year, for being able to share those honors this year, and for delegating Pennsylvania and Penn State as the annual recipients. Perhaps if Senator Thurmond's generosity holds up, the tide will turn for Senator DeConcini and Arizona and Arizona State next year. [Laughter.]

The hearing on this subject is a very timely one. The issue here has been raised by the recent signing of Herschel Walker, by the New Jersey Generals, after the representation by the commissioner of the United State Football League that the signing was necessary to prevent a violation of the antitrust laws. The commissioner of the league made that statement based upon a brief submitted to him by Mr. Walker's attorney, and upon two independent opinions which he had received.

The impact of the Walker signing has the potential to materially change the balance between professional football and college football in this country. The legislation which I have introduced, S. 610, does not seek to impose a Congress-made rule but would provide only that the leagues are free to have a rule or not have a rule as they choose, without being concerned about the applicability of the antitrust laws. This legislation would not mandate that the professional football leagues have a rule, any more than it would mandate that the professional basketball leagues, for example, have a rule. The basketball leagues do not have a rule and are free not to have a rule, as they choose. The matter would be strictly up to the leagues.

The issue is a very complex one and has many ramifications. It does seriously impinge upon the opportunity of young men like Herschel Walker, Marcus Depree, and others to take advantage of a very saleable commodity, which is worth a great deal of money, at an important point in their athletic careers. We are mindful of the fact that if a Herschel Walker or a Marcus Dupree continues to play college ball, that he could sustain an injury and might forfeit

an opportunity to earn the very substantial sums of money which provide freedom and economic security for himself and his family.

We are also very mindful of the advantages of a competitive marketplace to those young athletes. We are also concerned about the opportunities of young men to complete their college education in a rules environment that has apparently worked reasonably well over the years. There have been allegations that the college athletic system is a minor league training ground for athletes, that colleges exploit the athletes, and that the athletes do not complete their educations. These hearings will provide an opportunity to explore all of these subjects to see if the current rule does work to protect the college athlete, or whether it works against their best interests.

The existing rules have been in effect for the last 50 years. In proposing this legislation, it was my sense that they were ripe for examination. College football is a major institution in the United States. It has tremendous economic impact everywhere, including my own State of Pennsylvania, where we have a number of college football teams in addition to Penn State, the national champion, where we have prominent professional football teams like the Steelers, the Eagles, and now, the Stars. Football creates tremendous employment opportunities. It fills a tremendous number of hotel rooms, it creates related jobs for the State and for the Nation.

Since this bill was introduced, there has been substantial comment about it on the sports pages, from comments which champion the free-enterprise system. We intend to fully explore those arguments and those considerations during the course of these hearings.

We have with us a distinguished array of witnesses: Mr. Joe Paterno; Mr. Bo Schembechler; Mr. Ed Garvey of the NFL Players Association; Mr. Mark Murphy, player representative of the Washington Redskins; Charles Grantham, executive vice president of the National Basketball Players Association; Mr. Willie Young, a professional football player with the Canadian League; Mr. Bob Auler, Mr. Young's attorney; Mr. Steve Ehrhart, counsel for the USFL; Bob Ruxin, a sports attorney; and John Toner, president of the NCAA.

And this is only the first hearing; there will be others. We had invited Commissioner Rozelle, of the National Football League; and Commissioner Simmons, commissioner of the U.S. Football League. But both declined, citing previous engagements. We had also invited Mr. Herschel Walker, who declined at the outset, and his attorney, Mr. Jack Manton, who had agreed to be here, but has declined in the last few days, sending his testimony instead.

At this time I would like to call on the distinguished Senator from Arizona, Senator DeConcini, for his opening statement.

OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DeConcini. Chairman Specter, thank you very much. I would like to take the opportunity to congratulate you for your concern and the speed in which you have organized these hearings, and join you in your compliments of Chairman Thurmond for organizing this at a very timely moment. The signing of Herschel

Walker by the U.S. Football League has captured the Nation's attention and underscores the interrelationship between collegiate and professional sports. I would like to believe, Mr. Chairman, that collegiate sports are truly amateur and thus quite distinct from professional sports.

I am aware, however, that there are those who disagree and who believe that contemporary collegiate sports are barely distinguishable from professional sports. These same cynics argue that colleges are little more than minor leagues which prepare athletes for the majors, exploiting young athletes in the process.

I believe that the signing of Herschel Walker does raise a number of important issues. I personally believe that college athletes should be separate from professional sports, and that the value of the institutions should be oriented toward education rather than athletic competition.

It is somewhat distressing to recall that, during the past 20 years, less than 40 percent of the individuals participating in any professional sports completed their college education. And this period coincides with the ban on underclassman recruiting by professional football. As a matter of personal preference, I would like to see our colleges and universities make it more of a point to insure that the young men and women they recruit on sports scholarships actually receive a meaningful college education. I would also prefer situations in which professional sports leagues refrain from tempting these young men and women away from their colleges and universities before graduation.

At the same time, Chairman Specter, I am not at all convinced that this is an area of legitimate congressional action. There appears to me to be a matter of internal policy for the colleges, universities, and professional sports leagues.

Some have suggested in the wake of the Walker signing that Congress move to prohibit such recruitment. That type of professional interference would be wholly inappropriate in this Senator's judgment. I understand, Mr. Chairman, that no such radical notion is being propounded by you in S. 610. I understand that your purpose is quite limited.

Indeed, I find myself in agreement with that limited objective which is to extend professional sports leagues an antitrust exemption for bans on underclassman recruitment. I do question, however, the efficacy of such legislation. To what extent will it help prevent or discourage the recruitment of underclassmen?

I hope the hearings this morning will throw some light on that question, as well as the broader implications of the Herschel Walker case.

Certainly, if the effects of these hearings are to motivate colleges and universities to provide greater incentives to their students to complete their education, then our time will have been well spent.

Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Senator DeConcini. Senator Heflin of Alabama could not be here, but wishes his statement read in the record. And without objection it will be made part of the record as if presented in full here. Also, we received a statement from Senator Tower of Texas which will also be included in the record.

[Statements of Senator Heflin and Senator Tower follow:]

PREPARED STATEMENT OF SENATOR HOWELL HEFLIN

Mr. Chairman, I wish to commend our distinguished chairman for calling today's hearing on this subject of utmost importance.

My good friend from Pennsylvania, Senator Arlen Specter introduced Senate bill 610, the Collegiate Student-Athlete Protection Act of 1983 to permit professional sports leagues to operate with rules designed to encourage college student athletes to complete their under-graduate education before becoming professional athletes. Senator Specter then explained that this bill, S. 610, was prompted by the signing of the University of Georgia's star football player, Herschel Walker, by a member team of the United States Football League.

In introducing this legislation, Senator Specter expressed his concern that in "the volatile competition between the National Football League and the U.S. Football League, the Walker case could lead to a stampede on recruiting of college players if the longstanding rules are not reinstated and preserved" concerning the eligibility of college athletes for professional play.

As is well known, we in Alabama have had an extraordinary tradition and interest in our intercollegiate football programs at the University of Alabama, Auburn University, Alabama State, Alabama A&M and at other educational institutions within our State. Today's hearing is an important first step in exploring all aspects of this college athlete eligibility question, and I intend to closely study the presentations made at these hearings.

The reactions to the signing of Herschel Walker by the USFL have been many and varied. Some have said that the remaining athlete eligibility rules in professional football, as followed by the NFL, do not serve vital purposes. Others say that the interests of college athletes and of the universities and colleges themselves in their educational and athletic programs are protected by such eligibility rules. And there are apparently some differences as to whether, if eligibility rules are important, they should be prescribed and administered by the colleges and universities or by the professional leagues.

On prior occasions, this committee has expressed the view that the public interest would be served by enabling the colleges and universities to require student athletes essentially to remain in college for the equivalent of a 4-year course of study prior to contracting with professional athletic leagues. For example, legislation recommended by this committee in 1965 would have made certain special antitrust law provisions unavailable to professional sports leagues if the leagues permitted member clubs "to enter into a professional athletic contract with any student who has matriculated, at a 4-year college granting degrees, before the earlier of the following dates (1) the date of the conclusion of the fourth academic year following his matriculation, or (2) the date of the conclusion, during the fourth academic year following his matriculation, at the college at which he first matriculated, of the scheduled intercollegiate season of the professional sport to which he has been signed."

At the present time, given the changes that have occurred in intercollegiate and professional athletics, I do not know whether an equivalent approach to the eligibility issue would be warranted or the most desirable. But the committee clearly could evaluate such an approach in its hearings.

I also do not know whether a bill that is merely permissive—enabling the professional leagues to respect college eligibility and the integrity of the intercollegiate programs, but not requiring them to do so—is the preferred approach. S. 610 appears to be permissive in this sense, and I believe the committee's hearings should consider whether mandatory legislation requiring adherence to rules protecting college eligibility would be the more desirable.

The committee should also, in my view, consider whether, in respect of these eligibility issues, the Congress authorization to impose the necessary rules should be granted to the professional leagues through an antitrust exemption for their conduct or to the colleges and universities, as institutions of higher learning, for their conduct. If the Congress is primarily concerned with the interests of the colleges and universities on this subject, then it may be that the antitrust exemption should be granted to the colleges and universities so they can establish sensible rules on these matters without fear of the antitrust litigation that now seems to plague all of the sports world. In other words, as an improvement to S. 610, I believe the committee may wish to evaluate the merits of legislation that would provide an exemption from the antitrust laws for agreements among institutions of higher learning to require college student athletes to remain ineligible for employment in any professional footbal league until 4-year courses of study have been completed by the entering college classes of such student athletes.

I look forward to today's hearing and working with Chairman Thurmond and Senator Specter in developing appropriate legislation.

Thank you, Mr. Chairman.

PREPARED STATEMENT OF SENATOR JOHN TOWER

Mr Chairman, I am pleased that the Senate Committee on the Judiciary decided to conduct hearings on S. 610—the Collegiate Student Athlete Protection Act of 1983—so quickly after the bill's introduction by my distinguished colleague, Senator Specter. My cosponsorship of S. 610 is indicative of my strong support for this measure, and I trust that upon further committee consideration the measure will be reported favorably to the full Senate.

For the purposes of clarification, it should be noted at the outset that our bill is not designed to prohibit any professional sports association or league—whether football, basketball, baseball, soccer or hockey—from recruiting the fine athletes in the nation's colleges and universities. Indeed, competition for top athletes during recruiting seasons by professional teams is both wholesome and essential to the continued viability of professional sports.

Although I am an avid sports fan, I also am a former college educator. The whole purpose of our Nation's colleges is to give young men and women solid academic preparation as they seek their degrees. I realize that many college athletes never complete their undergraduate curricula, but the fact remains that we owe these students—as we do every student—the opportunity to do so if that goal is within their reach.

The thrust of our bill simply insures that these opportunities remain attainable and available, and that we do not encourage those who would tempt young student athletes to abandon their educational aspirations.

As has been indicated, this bill merely makes it clear that professional sports leagues and associations have the legal authority to promulgate rules regarding recruiting and eligibility without being beseiged with antitrust charges.

The approval of our bill would grant a limited exemption in this area such that league or association rules currently in effect—rules which have admirably balanced the needs of professional sports with the opportunities for continued educational preparation—could continue to exist without the accompanying threat of lawsuits based upon alleged Clayton Act violations.

During the last few months, these long-standing rules have been under attack as college athletes have been subjected to recruiting strategies which have discouraged their completing their education or eligibility. I have spoken with professional and college football coaches in Texas regarding this matter. Each of them agreed that the approach encompassed by S. 610 provides a needed safety net.

The scope of the inquiry to be addressed by the distinguished members of this committee is as narrow and limited as the exemption provided by our legislation. It simply addresses the public policy issue of whether antitrust laws should bar professional teams from policing themselves. The effect, however, is a much broader public policy issue—whether college athletes will, at the least, be free from pressure to abandon their education.

It is clear that the Congress cannot force these athletes to follow this course. Yet, it is our obligation to provide the most favorable environment for doing so.

Mr. Chairman, I urge the members of this committee to report S. 610 favorably such that this measure can be considered by the Senate. Thank you for the opportunity to appear before you today.

Senator SPECTER. Before we begin with our first panel I wish to place a copy of S. 610 into the record.

[S. 610, 98th Cong., 1st sess.]

A BILL Entitled the "Collegiate Student-Athlete Protection Act of 1983"

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Collegiate Student-Athlete Protection Act of 1983".

SEC. 2. The Act of September 30, 1961 (75 Stat. 732; 15 U.S.C. 1291-1295), is amended by inserting after section 5 the following:

"SEC. 6. The antitrust laws as defined in section 1 of the Clayton Act, and in the Federal Trade Commission Act shall not apply to a joint agreement by or among persons engaging in or conducting the professional sports of football, baseball, bas-

ketball, soccer, or hockey designed to encourage college student-athletes to complete their undergraduate education before becoming professional athletes.".

Senator SPECTER. We are now going to call our first panel: Mr. Joe Paterno, head football coach, Penn State University, who is chairman of the Coaches Committee of the College Football Association; and Mr. Glenn "Bo" Schembechler, who is the head football coach at the University of Michigan, and president of the American Football Coaches Association.

Welcome, coaches. We are delighted to have you with us today. We look forward to your testimony. You may proceed, Coach Paterno.

STATEMENTS OF JOE PATERNO, HEAD FOOTBALL COACH, PENN STATE UNIVERSITY, CHAIRMAN, COACHES COMMITTEE, COLLEGE FOOTBALL ASSOCIATION; AND, GLENN E. SCHEMBECHLER, HEAD FOOTBALL COACH, UNIVERSITY OF MICHIGAN, PRESIDENT, AMERICAN FOOTBALL COACHES ASSOCIATION

Mr. PATERNO. Thank you, Senator. Obviously, it is an honor to be here representing the great State of Pennsylvania and representing Penn State University. But I think obviously it goes beyond that kind of representation that is important this morning.

Let me read a statement I have prepared. It is a short statement, and I think it may give us some background as to my position and what I believe to be the position of the majority of the college football coaches in the country, or at least the ones in the College Football Association.

As I say, it is not up to me to represent the College Football Association's Coaches Committee–and I may add to that statement that I am also a member of the board of directors of the College Football Association, and in that sense represent them, in coming here today to give the Senate Judiciary Committee our thoughts relative to proposed Senate Legislation, S. 610, the Collegiate Student Athlete Protection Act of 1983.

What is the College Football Association? The College Football Association, the CFA, is a voluntary organization consisting of 60 universities, all of whom are involved in the sponsorship of the sport of football at a major or NCAA Division 1A level.

The membership of the CFA includes the Atlantic Coast Conference, the Big Eight Conference, Southeastern Conference, Southwest Conference, and the Western Athletic Conference. In addition, the following universities without a conference affiliation are members of the CFA: Boston College, Florida State University, Memphis State University, University of Miami, University of Notre Dame, Pennsylvania State University, University of Pittsburgh, Rutgers University, University of South Carolina, University of Southern Mississippi, Syracuse University, Tulane University, the United States Military Academy, the United States Naval Academy, Virginia Tech University, and West Virginia University.

The CFA was established to provide a forum in which institutions with similar athletic and philosophies and football programs can exchange views concerning common problems, seek to obtain a

unity of purpose on vital issues, and plan legislative proposals for NCAA action.

Since its formation in 1977, the CFA has been in the forefront in proposing higher academic standards for student athletes, realistic rules governing the recruitment of prospective student athletes, further reorganization of the National Collegiate Athletic Association, to provide appropriate voice and vote for those universities involved in the sponsorship of a major college football program, and a recognition as to the responsibility of the coaches in the development of meaningful regulations, as well as adherence to both the spirit and the letter of the rules.

Those universities belonging to the CFA rely heavily upon their football programs to support and underwrite sponsorship of other intercollegiate athletic activities for both men and women.

Therefore, it is obvious that the CFA membership is interested in maintaining quality intercollegiate football programs. The recent signing of Herschel Walker of the University of Georgia by the New Jersey Generals of the United States Football League served to disrupt the generally harmonious relationship that has existed in recent years between college football and professional football.

The National Football League has a rule which prevents the drafting of student athletes until they have either completed their college eligibility, until 5 years have elapsed since the student athlete initially enrolled in college, or the student has graduated.

The National Football League has been willing to withstand the test of litigation in an effort to enforce its rule. The United States Football League pledged on numerous occasions that it would not sign student athletes with college eligibility remaining in the sport of football. Consequently, when the USFL condoned and approved the signing of Herschel Walker by the New Jersey Generals, although Walker had 1 year of eligibility remaining at the University of Georgia, such action was disturbing to those involved in college football. After careful deliberation and review, the board of directors of the College Football Association and the Coaches Committee of the CFA voted to support in principle, Senate Bill 610, the Collegiate Student Athletic Protection Act of 1983, and as we understand it, support—the intent of the bill is to remove the questions as to the legality of a rule such as has been implemented by the National Football League which prevents the drafting of student athletes until they have either completed their college eligibility, until 5 years have elapsed since the student athlete initially enrolled in college, or the student athlete has graduated.

We believe it is appropriate to provide the opportunity for professional leagues to work with the college, and should a professional league such as the National Football League desire to enforce a rule designed to protect the intercollegiate athletic eligibility of a student, it should be allowed to do so without the threat of litigation.

However, I personally share the concerns stated by Senator Specter in the Congressional Record when in introducing this bill he stated, and I quote, "At the same time there is a serious question on the right of young adults to decide their employment opportunities for themselves and leave school to take advantage of phenomenal offers. Given the limited time span of a professional football

career and the possibility of a collegiate injury precluding a later professional career, there is some validity to the contention that college players should be free to seek lucrative contracts before finishing their education and eligibility."

In addition to these concerns, there are at times other extenuating circumstances whereby a college football player should be allowed to sign a professional football contract before his college eligibility has expired.

Historically, the NFL and the NCAA have been able to accommodate these cases in a manner which was fair to the college player and not disruptive to the institution's football program. I would hope that these concerns will be explored during these hearings.

[Material supplied follows:]

STATEMENT OF COLLEGE FOOTBALL ASSOCIATION, FOOTBALL COACHES COMMITTEE

The CFA Football Coaches Committee held its annual meeting in Atlanta, Georgia on March 9, 1983. During the course of the meeting the Committee met with representatives of the National Football League and the United States Football League and reviewed matters related to college-professional football relations.

At the conclusion of the meeting the coaches issued the following statement:

"The CFA Football Coaches Committee has reviewed in detail the actions of the United States Football League and expressed considerable concern about maintaining the order and viability of college football.

The CFA Football Coaches Committee voted to endorse the position previously adopted by the CFA Board of Directors in supporting the spirit of Senate Bill 610 (the Collegiate Student-Athlete Protection Act of 1983) and invited both the National Football League and the United States Football League to adopt a similar posture.

There are several important questions that need to be resolved and require the attention of both college and professional football interests including a recognition of the position of the student-athlete and the future of college football. Until this matter is resolved, either through legislation or agreement, it will be difficult for CFA members to cooperate fully with the USFL.

It would be helpful if the owners of the various USFL teams would advise the CFA in writing of their position relative to their team's signing practices.

The Football Coaches Committee anticipates that meaningful progress will be evident by the time of the CFA annual meeting June 3-5, at which time there will be a thorough review of the situation by the membership. At the June meeting it is expected that the CFA membership will develop a firm policy and course of action regarding possible amendments to existing NCAA legislation and future relations with the USFL."

Senator SPECTER. Thank you very much, Coach Paterno. Before proceeding to any questions, we would like to call on you, Coach Schembechler, for your testimony.

Mr. SCHEMBECHLER. Thank you, Senator Specter. My main mission here is that I am the president of the American Football Coaches Association, and I am here to support Coach Paterno in his presentation.

However, I think during the course of these hearings, we ought to keep a couple of very important things in mind: No. 1, the college football mission is not to prepare professional football players. The college football experience should be as a student athlete where they are pursuing a degree and having a meaningful experience in playing college football in a college setting.

If they play the game and enjoy it and get something out of it and eventually receive a degree, then we think that we have accomplished our mission. The fact that we have some players that

are good enough to play for the professionals stands to reason because we are their only recruiting ground. But, by and large, the vast majority of football players, no matter how great the college program may be, are in college to get a degree and to enjoy the experience of playing college football.

Very, very few of them will be successful in professional football. Our problem is that we have too many people, too many cynical people that are looking at college football today as a bigtime business, and particularly has been brought to light since the signing of Herschel Walker.

We have a great problem in college football trying to keep unscrupulous agents from contacting our players prior to their senior year and prior to their completing their eligibility in college. It has become a great problem. If we allow the professional leagues to come in and draft undergraduate players or sign undergraduate players, then we are opening the doors for every unscrupulous agent—and there are plenty of them hanging around our campuses—to start contacting our youngsters and enticing them to forgo their education and to take a crack at professional football. For every Herschel Walker that goes into the professional league, whether he goes early or whether he goes after his final year of competition; there will be twice as many—maybe 5 times or 10 times as many that will be unsuccessful when they go into professional football.

And then the most important single ingredient that they have as a benefit from playing college football is a degree from that university.

And I think that anything that we do to disrupt the educational experience of a college football player is a mistake, because by and large, there are very, very few of them that are qualified to go into professional football as an undergraduate.

My honest opinion as a coach—and I think if you talk to the professional people who really know what they're talking about and have been in the league for a long period of time—the undergraduate college player is not physically, mentally, or emotionally ready to go into professional football. You may look at them and say they are great college players, but they are playing against other college players. Football being the most legislated sport there is . . . there is very little opportunity for these players to really hone their skills. We have 20 days in the spring, and we have the fall, and that is it.

Consequently, in my opinion, there are very few of these youngsters—if any—in my 30 years as a college coach, I have never had one that I felt as an undergraduate was ready in all areas to go into professional football. The last thing that I would like to say is that the difference between football and basketball or hockey or baseball is that you have got to keep in mind that we as coaches are trying to make this an educational experience for the guys that play for us.

Yet we are also strapped with the responsibility of financing, through gate receipts in football, the entire athletic programs of major universities, both men and women, and when we start coming in to take our outstanding players off of our ball clubs, I

think you stand a good chance of hurting our opportunity to provide those resources to keep our athletic programs alive.

My basic feeling is I do not think that we ought to look at this thing as what is in the best interest of one or two individuals, because, as Joe has mentioned, there are exceptions, but they are very few and far between, and in my mind, I am not sure that Herschel Walker should have been an exemption.

Thank you, Senator.

COLLEGE DEGREES

Senator SPECTER. Thank you very much, Coach Schembechler. The National Football League Players Association cites statistics that only 29 percent of those players now with NFL teams have earned college degrees.

Do you agree with that statistic?

Mr. SCHEMBECHLER. I do not know anything about these statistics.

Senator SPECTER. Does it sound about right to you?

Mr. SCHEMBECHLER. Other than—I will tell you this: since I have been the head coach at Michigan in 1969, of all the players that have been drafted by the National Football League, 85 percent of them have degrees.

Senator SPECTER. But 85 percent from Michigan.

Mr. SCHEMBECHLER. From the University of Michigan.

Senator SPECTER. So you do not have any sense as to whether the 29 percent statistic is accurate overall?

Mr. SCHEMBECHLER. No, I do not. I do not have any way of knowing that.

Senator SPECTER If that figure is accurate, Coach Schembechler, it would tend to indicate that the protection afforded by the rule has not produced a very large number of college graduates. When we seek to balance the interests of all those involved, and to emphasize the long-term interests of the college student, it is important for the Congress to know how many of the students actually get their degrees. If, as some contend, it is just a sham rule and only a relatively small percentage of students graduate, that it may not work to the benefit of the students to have such a rule.

Mr. SCHEMBECHLER. I think there is another factor, Senator Specter. Many of those youngsters that go into professional football that have not completed their degrees will do so during the time that they are playing or after their playing days are over, because it may be a case where they are only a few hours short in order to get their degree. I know it has happened to some of our players, and I am sure it has happened with other universities.

Senator SPECTER. Coach Schembechler, when you say that there is a very heavy burden on the football program to finance the other college athletic programs, I understand that. But that raises a question as to whether this is an appropriate burden for a college football program, or whether the universities ought to finance their athletic programs in some other way. I wonder whether the financial success of college football programs is not attributable to young men like Herschel Walker and other stars, and whether the current system enables the State of Michigan or the State of Penn-

sylvania to avoid financing the athletic programs in some other way, at the expense of the stars who attract the big crowds.

Mr. SCHEMBECHLER. Well, the problem there is in your athletic programs, since you get no financial resources from the university, from the university's general fund, that you have to finance your own program, and it just so happens that football is the most popular spectator program.

So it stands to reason the burden of financing the entire athletic program falls on the football team.

UNSCRUPULOUS AGENTS

Senator SPECTER. Coach Schembechler, in your testimony you have referred to unscrupulous agents. How would you define an unscrupulous agent? At what point does an agent become unscrupulous, in terms of not representing the best interests of the athlete?

Herschel Walker's attorney, Jack Manton, was quoted extensively in the press as saying that he tried very hard to look after Herschel's best interests, that he was not pushing him, and that he had explored all the considerations with the family. In a free society where people can talk to one another, you cannot post signs on the Michigan campus and keep agents off, and say, in effect, that anybody wearing an agent's tie is excluded from Ann Arbor. How do you make the distinction between scrupulous and unscrupulous agents?

Mr. SCHEMBECHLER. Well, probably I make it myself, but the fact remains that in my opinion, the vast majority of the football players do not need legal consultation until such time as they are drafted by a professional football team and they need representation at that time to negotiate a contract.

It is a violation of NCAA rules for you to have an agent prior to your final year of eligibility. We have agents who are contacting our players as undergraduates, which apparently had happened in the Herschel Walker case, in which case if any agreement had been made, they would be in violation of NCAA rules.

Senator SPECTER. Well, Coach Schembechler, the NCAA may have such a rule, but it is highly questionable if it is an enforceable rule in light of other provisions of the antitrust or other laws. When you argue that a player does not need a lawyer until he has been drafted, that presupposes the current system. If the young man wants to be included within the hardship rule that Coach Paterno was just speaking about and that I intend to explore with him in just a moment, the player might well need legal counseling to stay within the framework of the NCAA rule. It is hard for a 20 year old man—for that matter, a young man of any age—to know when he does or does not need a lawyer. You really only find out when you have talked to a lawyer and have started to explore the issue.

Coach Paterno, at this point let us turn to your testimony where you said, I believe, that under some circumstances, a college student should be able to sign. And I think you were alluding to a hardship situation.

Mr. PATERNO. Well, I would be alluding to a situation wherein the youngster may for some reason or other may not be able to compete because of the NCAA eligibility rules, because of situations such as one that has been publicized lately, and as I understand, you are going to have a young man speak before you, Willie Young, who is 25 or 26 years of age, who has three or four children—I am not sure of all the details of the case.

But I think there are situations there that I do not think anybody involved in intercollegiate football would want to deprive him of an opportunity to go out and explore those things. Our concern is with the 19- and the 20- and the 18-year-old youngster who all of a sudden now is thrown into an open market and who can be—maybe the word is improperly used, but seduced into thinking he is a little better commodity than he is, and then is talked into giving up a college education in order to go on.

I think there are cases such as the Willie Young case; there are cases such as an Al Hunter case, a few years ago who played at Notre Dame, who was for some reason or other, was declared ineligible at Notre Dame. He had not graduated. He still had by NFL rules—he was not eligible for the draft. The NFL was able to work that out with the NCAA, work it out with Notre Dame, so that the youngster was not hurt. He was able to go in.

Senator SPECTER. So you are thinking only about a situation where the youngster is ineligible, not where there might be some element of extraordinarily family hardship.

Mr. PATERNO. No, I am not thinking about exceptions for a youngster because he wants to declare a hardship case because he is anxious to go on with his professional career. No, I do not think we want to get into that.

I think the problem you get into right now is just exactly the point you made with 29 percent of the kids in the NFL who have not graduated. We are aware of that in the NCAA. We have instigated legislation in the last couple of years that in order to be eligible a youngster has to make normal progress. We are trying to raise academic standards in the beginning of their careers so that they have a better opportunity.

But if we all of a sudden now say that, you know, you have an open market, we will have a lot of people who are not good enough to play professional football who do graduate. We are looking at a very small number of college football players involved when you talk about the NFL. On a squad of 25 seniors, you are talking three or four people who will go into professional football.

And maybe of that three or four, maybe half of those will graduate because of some things involved in pursuing a professional football career. There are tryouts. There are trips. There are physicals, and all those things which take time away from their classes, seniors, which make it difficult for them to graduate.

Now, if we just backed that all the way down to sophomores, we have completely destroyed any attempt that we as coaches—we cannot do the job that some of us are in college football feel they are there to do.

We are there to make football a plus in their college experience, not to create professional football players.

NCAA RULES

Senator SPECTER. On the subject of the NCAA rules as to loss of eligibility, Redskin Quarterback Joe Theisman was quoted after the Walker signing as saying that the problem was a product of the archaic NCAA rules, that Herschel found himself in a situation where he had probably lost his eligibility under the rules because he had crossed the threshhold, and that if he had the opportunity to rethink it that he might have stayed at Georgia. Is it a rational rule which imposes such an onerous constraint and costs a player his eligibility? It may be that Walker went pro because he had no alternative at that point. But he might have wanted to rethink his decision.

Mr. PATERNO. Well, most of the rules in the NCAA, as in all rules of an organization, are in the best interest of the vast majority of the people involved. In some cases—in the Walker case, perhaps that was a little bit too stringent, and because all of us feel that if he had an opportunity to really think this thing out, he would much rather be back in college than he would be playing professional football today.

But he was caught in a bind, and he was caught in a bind because he was coerced through the people that were talking to him and his coach was not in close contact. If that had happened, I am sure he would have advised him not to sign anything and not get involved with any type of agent or lawyer at this time so that he would not.

Senator SPECTER. Why do you say he was coerced?

Mr. PATERNO. Well, in my opinion, if he had changed his mind and wanted to go back to college—and by that time he had professionalized himself because he had signed a contract in violation of the NCAA rule; he had no choice. But I think it was pretty well documented, if you believe what you read, that he wanted to change his mind and was unable to do so.

Senator SPECTER. But he might have wanted to change his mind.

Mr. PATERNO. Either way. I am not saying that the NCAA rules are absolutely perfect in any sense of the word, because they are not. But basically I think that the rules have been drawn up over the years in the best interest of the kids that play and college sports in general——

Senator SPECTER. I have a number of other questions, but we try to observe a 10-minute rule and alternate the questioning, so I will defer at this point to my colleague, Senator DeConcini.

Senator DECONCINI. Well, Mr. Chairman, thank you very much. Your point of questioning is most astute and appropriate. I will need less than the 10 minutes. I have a question for both Coach Schembechler and Coach Paterno. During your tenure at the University of Michigan and Penn State University, freshmen were allowed to participate in varsity sports for the first time.

Do you feel that changes in eligibility requirements such as this have had an adverse effect on student athletes or has it been positive?

Mr. SCHEMBECHLER. Well, my own personal opinion is that I would prefer that freshman not be eligible to compete with the var-

sity. Our problem is that when we went to the freshman eligibility rules, we reduced the number of grant-in-aids available, which——

Senator DECONCINI. Reduced—excuse me?

Mr. SCHEMBECHLER. We reduced the number of grant-in-aids that were available. We were in a position where each year 8 to 10 freshmen were almost forced into competing on the varsity because we needed them. That is how it all came about. The freshman eligibility rule, I think, was passed for economic considerations, and I am not sure it is in the best interests of the student athlete.

Mr. PATERNO. I would concur with that. I think that it is very unfair to ask a youngster to come in and play major college football or major college basketball and expect them to make the normal adjustment of being a college student. And I would—and I am sure that we are going to have strong—we are going to try to create some strong support and have that rule changed at the next NCAA convention in January.

I know that we are moving slowly toward it. As I am sure you are aware, the American Council on Education has some committees now, college presidents who are concerned about it. And I think that is a legitimate criticism of the NCAA.

I think that is correct. I think we have a lot of things we are aware of in the intercollegiate athletics that we are trying to resolve piece by piece. We are trying to raise standards for scholarships. We are trying to create a normal progress situation so a youngster does have an opportunity to graduate with his class. We are concerned with freshman eligibility.

We are doing a lot of things, and now all of a sudden we have another disruptive factor that we were not prepared for, and it is very difficult for us at this time to be able to handle everything we are trying to do. And now we have something else that is upon us that is literally, if we do not get some relief, either through legislative action such as this, or we are able to create some legislation on our own part to protect what we have and create an orderly procedure, I think we may find college football in chaos. And that is my concern at this time.

Senator DECONCINI. Thank you, coaches. Let me ask one further question.

Coach Schembechler, you mentioned a figure of 85 percent of University Michigan football players that go into the professional football have degrees; is that correct?

Mr. SCHEMBECHLER. Of the players that were drafted by the National Football League since 1970.

Senator DECONCINI. Is that similar to Penn State University?

Mr. PATERNO. Well, we would have—at one time we took a survey, a couple of years ago; we had about 38 people in the NFL, and I think 33 or 34 of them had their degrees. The other three or four were very close to it. Somebody passed me a note here that Notre Dame this past year had 84 percent of all—well, yes, 80 percent of all football players who entered the NFL for 5 years prior, as freshman, received their degrees.

So I think that when you are talking about certain institutions, there are, you know, the figures are good.

Senator DECONCINI. What do you attribute that to? I know you are both modest men and do not want the credit.

Mr. PATERNO. Do not bet on that.

Senator DECONCINI. Obviously, you have a program that encourages that. What do you do?

Mr. SCHEMBECHLER. In our conference we have had down through the years, a progress toward a degree requirement, which meant that you were not eligible from year to year unless you passed a certain number of hours.

We also had the advantage at Michigan that we are in a trimester program where our second semester is over by the end of April. Many of our players have been given an opportunity to go in the spring and summer; they could go a spring term and still get out the second week in June and have a couple of months off in the summer before they report back for football.

Many of our players have taken advantage of that opportunity, so we have been fortunate, but it is a matter of emphasis. I mean, if you keep emphasizing the importance—because you have to realize that the vast majority of the players on any football team are there to get a degree. We are only talking about a very small minority that are thinking completely of I want to be a professional football player.

Those guys you have to stay on because many of them are going to be tragically disappointed when their opportunity comes and they do not make it. If they do not have a degree, I think it is a tragedy.

Mr. PATERNO. I would say this about people graduating in a particular institution. I think there is a strong responsibility on the faculty and the faculty senates of institutions to make sure that a youngster does make normal progress.

We have had as an independent school without any conference affiliation, the same kinds of normal progress rules that I would imagine a Big 10 has, and our faculty has insisted on that. They have also insisted on certain academic standards in order for a youngster to come in, regardless of whether he is an athlete or a nonathlete.

So I think that it is a question of an institution being determined that they are not going to exploit a youngster. Let me play football. Let him play basketball, and then at the end of 4 years when he has used up his eligibility, you go.

So I think it is a question of an institution just making up their minds they are not going to exploit kids.

Senator DECONCINI. Thank you, coaches. Has USFL's signing of Herschel Walker had, to your knowledge or feelings, any direct effect on your program, on your players, other than just discussion. Have you seen anything adverse actually occur?

Mr. SCHEMBECHLER. Well, I think it is too soon to determine whether it will or not. Right now, I would say no. But who knows? If there is any effect on our players, it will have to come from some external source.

Mr. PATERNO. Well, yes, I have seen it. I have a very outstanding young junior, wide receiver who will be a senior; he has been an excellent student. He has made up his mind he wants to have a career in the investment business, worked with Merrill Lynch in the summers, and so forth.

And he does not have a telephone because he does not want to be bothered by people who all of a sudden are talking to him about his possibility of being a professional football player.

Now, these are not representatives of the USFL or representatives of the NFL; they are the so-called unscrupulous agents, that Bo referred to, who really feel that this is a commodity that they can sell. He is more aware than some others, and so I think—and I have heard again from some people connected with—Marcus Dupree was mentioned—that there are some people who have contacted Dupree's parents already with the idea that, you know, you can get X number of dollars. Do not waste your time. We will try this case in court for you.

You know, because Judge Simmons of the commission of the USFL obviously opened up a can of worms when he said we could not withstand the pressure of a legal case. Now, the agents may be unscrupulous, but they are not dumb. And I am sure they are attacking it with that idea. Hey, look, here is a commissioner of one of the leagues who says it cannot hold up in court. What are we fooling around with. All right, here, we will go out. Sign with me. I will take you and we will get you a couple million bucks.

Well, you know, that makes it very tough to be able to—we are not talking about—you know, sometimes people have a tendency to think that, well, we are being unfair because we want that youngster to stay with us.

I think you have to look at the Walker situation in light of some other elements. You take Herschel Walker, who spent 3 years at the University of Georgia; used their magnificent facility; had the tremendous exposure that college football was allowed to give him because it is such an exciting game and people identify with it; got the kind of coaching he got; had the kind of help because he was on a good football team; had the kind of competition that he could get better.

Now, at the end of 3 years, he takes off. You almost would think that Georgia had some right for compensation because their television and all of the things they may have budgeted into their program in order to take care of the 20 or 22 sports they may have, a lot of that income is gone. And now they have to scramble.

So, I think it is a two-way street. And I think that obviously, that if Herschel Walker was being—somebody was doing something that was going to prevent him from being a pro next year—Herschel Walker graduating from high school would not be worth $2.5 million to any pro team.

He is worth $2.5 million because the intercollegiate football programs that we are talking about have made it possible for him to develop his skills. You know, you take an actor on off-Broadway in New York, he spends all that time—an opportunity for him to be able to go on and be a decent actor.

And we provide those opportunities to those people and if we allow Herschel Walker to go and then five more go and six more go, we are not going—in the long run, in the long run we are going to jeopardize the financial opportunities of some kids down the line who will not have that kind of exposure, facilities 'coaching, competition, have an opportunity to develop themselves.

It is a two-way street. We may be selfish, to a degree, but we certainly are not hurting - we have not hurt youngsters.

Senator DECONCINI. Well, Coach Schembechler and Coach Paterno, I want to thank you very much for your assistance here. Penn State University and the University of Michigan are indeed fortunate to have your kind of leadership and we hope you will consider to play our schools in Arizona and participate there.

We have more Michiganers coming there all the time. You have dual loyalties out there now, and we welcome you there. And we certainly appreciate—this Senator does, and I am sure the chairman does—your leadership in this role in the area of college football and college sports in general. It is a tribute to have you here and a tribute to the sport itself and the institutions you represent, and I am very, very proud of each of you.

Thank you. Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Senator DeConcini.

Coach Paterno, you noted that Commissioner Simmons opened up a can of worms with the statement that the USFL could not have withstood the pressure of a lawsuit. Some have speculated that it was an excuse and not a reason.

What is your thought on that?

Mr. PATERNO. Well, you know, I would hesitate, Senator, to speculate on somebody's motives, not really knowing. I can only look at the effect of the decision. And as I look at the decision, it is a very harmful statement in so far as how it is going to affect a lot of young people who are not as good as they think they are, number one.

My problem is you have a lot of kids out there that all think they are great football players, and very, very few, even the seniors can make the NFL. And if that thing is hanging over their heads that they can do it any time, the minute something does not go right for them at an institution, that is why we have the transfer rule.

In a sense, the transfer rule of the NCAA is against the rights of an individual. Why should not an individual be able to transfer from Michigan to Penn State and play immediately? But he cannot. He has to sit out a year because it is for the good of the majority of the people involved.

And now if we have this other opportunity for a kid to jump as soon as he does not like what goes on on a campus, does not like the way you play the game, does not like whether you are throwing the ball or not, so he decides to go. He may not be ready. That is my problem. He may not be ready, and he is going to be talked into thinking he is ready, and we are going to lose some people that should be in college and should get their degree.

Senator SPECTER. The motives of Commissioner Simmons and the USFL might be evaluated in the light of a report on March 4 that a truce had been obtained between the U.S. Football League and the American College Football Association, and that the league would not sign any more players while the new eligibility rules were being drafted.

Is there anything to that report, Coach Schembechler?

Mr. SCHEMBECHLER. Well, we had representation at a meeting in Dallas. There was no official truce between the American Football Coaches Association and the U.S. Football League.

Senator SPECTER. Unofficial truce?

Mr. SCHEMBECHLER. Well, it is not even an unofficial truce because the——

Senator SPECTER. A softening of the line? [Laughter.]

What happened?

Mr. SCHEMBECHLER. Well, among some people, maybe, but certainly not among the trustees of the American Football Coaches Association, because we did not have an opportunity to act on that.

I want to set the record straight there, that we are not, as an organization, in my opinion, satisfied with any agreement that was made in Dallas.

Senator SPECTER. Do you recall the quote by a staunch member of the coaches association who said, "I am not going to sit down with some guys that have already socked it to us." Wasn't that Coach Schembechler who said that?

Mr. SCHEMBECHLER. Right. I think that is an accurate quote, Senator. [Laughter.]

Senator SPECTER. Well, it is nice to have one now and then. [Laughter.]

Mr. SCHEMBECHLER. Right.

Senator SPECTER. Do you still feel that way?

Mr. SCHEMBECHLER. Yes, I still feel that way. It is like saying, as Joe said, that we were afraid that they would take it to court. Well, what is to stop them from taking it to court again? The fact that they told us before the Herschel Walker case that the U.S. Football League would not draft any underclassmen, that they would follow the NFL rule, and they broke their word, and I am not sure——

Senator SPECTER. Who told you that, coach?

Mr. SCHEMBECHLER. Well, that agreement was made with Chet Simmons and Charlie McClendon, the executive director of the American Football Coaches Association.

Senator SPECTER. Charlie McClendon was quoted on March 4 as saying that the, "Walker incident is behind us and is now a dead issue."

Mr. SCHEMBECHLER. That was his personal opinion, Senator.

Senator SPECTER. Well, it has the appearance, whether you call it a truce or not, of an arrangement having been reached between the USFL and the coaches association.

Mr. SCHEMBECHLER. I think until such time as the coaches association meets, either the trustees or the entire body, whereby we can come up with some reasonable legislation or come to a decision as to how we feel about this situation, it is going to be an individual coach's proposition. That is the way I look at it now.

Our trustees do not meet until June, and we are not going to. The main body of the organization does not meet until January, but I think it is going to be an individual coach's option to do whatever he thinks is in the best interest of his program.

Senator SPECTER. Well, will there be some formal proposition put before the association at that time on an agreement between the league and the association.

Mr. SCHEMBECHLER. Yes. We will meet early in June, Senator, and we will discuss it at that time. That is the only thing that I can say to you right now.

Senator SPECTER. What is it that you will discuss at that time? Has the league made you an offer?

Mr. SCHEMBECHLER. Well, what are the ramifications of the Herschel Walker signing. We have had no meetings at all on that issue, other than Mr. McClendon meeting with USFL people in Dallas.

Senator SPECTER. That's fascinating. If Mr. McClendon meets with the USFL people in Dallas and they discuss an arrangement to restrain signing of college athletes, and if the antitrust laws apply, then that is practically a conspiracy under seal. You do not have to comment about that. [Laughter.]

But that is quite a meeting, and that is quite a proposal.

Mr. SCHEMBECHLER. Well, there was no——

Senator DECONCINI. If the chairman would yield, based on the lack of enforcement from the Justice Department in antitrust, I think they are pretty safe to go ahead. [Laughter.]

Mr. SCHEMBECHLER. But there is no——

Senator SPECTER. And he is a first-rate lawyer. You can quote him on that. [Laughter.]

Mr. SCHEMBECHLER. But there is no agreement between the U.S. Football League and the American Football Coaches Association. There is no agreement.

Mr. PATERNO. Senator, if I may, just—I do not want to interrupt here, but the CFA, the College Football Association, which is made up of 60 of the major schools, we do not have the PAC 10 and we do not have the Big 10 among us, but we have pretty much everybody else.

Our coaches committee did meet with representatives of the NFL and representatives of the U.S. Football League, and we did come out with a statement that we agreed on. If I may read it, it is very short.

Senator SPECTER. Please do.

Mr. Paterno [reading]:

The CFA Football Coaches Committee has reviewed in detail the actions of the U.S. Football League and expressed considerable concern about maintaining the order and viability of college football.

The CFA Football Coaches Committee voted to endorse the position previously adopted by the CFA board of directors in supporting the spirit of Senate bill 610 and invited both the National Football League and the U.S. Football League to adopt a similar posture.

There are several important questions that need to be resolved and require the attention of both the college and professional football interest, including a recognition of the position of the student athlete and the future of college football.

Until this matter is resolved, either through legislation or agreement, it will be difficult for CFA members—

That would be the College Football Association coaches—

It would be difficult for CFA members to cooperate fully with the USFL. It would be helpful if the owners of the various USFL teams would advise the CFA in writing of their position relative to their teams' signing practices.

And then we conclude by saying:

The football coaches committee anticipates that meaningful progress will be evident by the time of the CFA annual meeting, June 3 to 5, at which time there will be a thorough review of the situation by the membership.

At the June meeting, it is expected that the CFA membership will develop a firm policy and course of action regarding the possible amendments to existing NCA legislation and future relations with the USFL.

Now, I do not exactly call that a war, but it is—I think we have served notice that we are not happy with their actions and that we are not pardoning them at this stage, and that there is some——

Senator SPECTER. You are not pardoning them at this stage.

Mr. PATERNO. Absolutely not.

Senator SPECTER. Well, what is in it for them? Coach Schembechler says that each coach is going to consider it on an individual basis. Are you saying that that will determine your receptivity, talking to their agents, or the advice you give your students? What do they get out of a good relationship with the coaches association?

Mr. SCHEMBECHLER. There are a lot of questions that have not been answered concerning the U.S. Football League: their territorial rights policy, their draft policy, what they are going to do about paying educational expenses of players that they pull out of their last semester of school. There are a lot of things that have not been clarified for us.

I think right now the only thing we can do is whatever a coach wants to do individually until we decide as a group how to handle this thing.

SCHOLARSHIPS ON YEAR-TO-YEAR BASIS

Senator SPECTER. There is a comment in the written statement from Mr. Ed Garvey, the executive director of the NFL Players Association, raising the question about scholarships being granted only on a year-to-year basis, and posing a question about whether it would not be better as a matter of fairness to the students to grant scholarships on a four year basis, or until the completion of their undergraduate degree, so that there is more equity and a students does not run the risk of having those moneys cut in the event that he is injured or does not make the team. What is your thought on that, gentlemen?

Mr. SCHEMBECHLER. The general policy is that the renewable aspect of a grant in aid is automatic, provided that the youngster is eligible to compete and that he is academically in good standing with the university.

There could be situations where he is eligible to return to school and ineligible for football, or he could be eligible for football and ineligible to return to school, so that is the basic criteria. Almost every situation that I know of, the grant in aids are only from a year to year basis and are only taken away if the student athlete voluntarily gives up participation in football.

Senator SPECTER. So you are saying if a player is injured, it is not eliminated?

Mr. SCHEMBECHLER. If he is injured, there has never been a grant in aid, that I know of, taken away from a youngster.

Senator SPECTER. Or if he is cut from the team?

Mr. SCHEMBECHLER. Well, no one is cut from the team, really . . . so that is not a factor. I can say this to you——

Senator SPECTER. Not everyone who has a scholarship makes the team, do they?

Mr. SCHEMBECHLER. What is that?

Senator SPECTER. Not everyone who is granted a scholarship makes the team.

Mr. SCHEMBECHLER. No, but they all contribute. They may not play on Saturday, but every football player contributes.

Senator SPECTER. Well, are not some scholarships granted before the player is even given a uniform? You have a limited number of players on your team.

Mr. SCHEMBECHLER. Right.

Senator SPECTER. Are not some players given scholarships before there is a determination as to whether they are going to make the overall team?

Mr. SCHEMBECHLER. Sure, they all are. The scholarships are signed in February.

Senator SPECTER. So that if a student does not make the team, his athletic scholarship aid is not cut?

Mr. SCHEMBECHLER. Scholarship aid, in our situation, is never cut. Once you have received a grant in aid, that is your grant in aid for the next 4 years. From year to year, it has to be renewed on the basis of your eligibility to participate. Whether you are a great football player or whether you are first string, fourth string, or demonstration player your entire 4 years, it makes no difference.

Senator SPECTER. But you have to be on the string or a demonstration player.

Mr. SCHEMBECHLER. Well, we cut no players, Senator. I mean, they are all on the squad. If you are recruited and you are there, you are on the team.

I did say, if you——

Senator SPECTER. So that everyone who is recruited stays on the team in that capacity?

Mr. SCHEMBECHLER. Sure. Sure.

Mr. PATERNO. Senator, there are procedures to protect the individual even though he only has a written 1 year agreement. Now, personally, I would agree with what Mr. Garvey said; I think we ought to have a four year agreement, and I have personally said to the youngsters that you literally have a four-year agreement. I cannot put it in writing because it is against the NCAA regulations.

But I have been at Penn State 33 years; we have never taken a dollar away from a youngster at any time because he was not a good football player or because he was injured or what have you. In fact, at times we have eliminated people from a squad for disciplinary reasons and allowed them to continue on grant in aid so that they could continue toward their degree.

If, however, if somebody would be a malcontent, would not want to make a consciencious effort to football, whether he would not consider being a demonstration player, whether he would be detrimental to the whole situation, we do have the right to eliminate him.

But he has to go through a procedure that the university has to set up. He has the opportunity to have hearings and go on with that. Personally, in our institution, we do not—you know, if we get

one of those kinds of kids, we just say, you go; we will take care of your grant in aid. It is a lot less hassle for us, public relations and everything else.

So we have not taken any away from them, but it could happen. But the NCAA has built in some—a procedure where the youngster does have some protection.

Senator SPECTER. Coaches, I would like to cite two NCAA rules which appear to be very restrictive, and ask for your comments on them.

One of them is:

> Any individual who signs or has ever signed a contract or commitment of any kind to play professional athletics in a sport, regardless of its legal enforceability, or the consideration, if any received, loses his eligibility.

Is that not a very, very tough rule, to impose a loss of eligibility even if there was never an enforceable contract? Absent that rule, might not Herschel Walker still be on the Georgia roster?

Mr. PATERNO. Well, I think it is a very tough rule. I think it is a bad rule. Again, I am talking—I am not speaking for the College Football Coaches Association when I speak on this point because we hope to bring that up in our meetings in June.

I think that you have a rule that cannot be enforced. There is no way to know whether a youngster has made a verbal commitment to have somebody represent him as an agent. There is no way to find—we cannot subpoena to find out whether he has a signed document or not.

So I am against any rule that you cannot enforce. I just do not think it makes much sense; plus the fact, I do think that a youngster has a right to explore certain things. And if he needs legal advice as to what his situaion may be and if he wants to identify somebody who is going to represent his interests when it is time to graduate, or what have you, I would prefer that.

I have said many times we ought to try to get the agents out of the closet so that I can sit down with the youngster and his competent representation or sit down with the youngster when he is discussing people who might want to represent him and advise him as to whether the people are competent.

Senator SPECTER. Coach Paterno, that leads me to the other rule that my excellent staff considers to be very onerous, and it is one which says:

> Any individual who contracts or has ever contracted orally or in writing to be represented by an agent in the marketing of the individual's athletic ability or reputation in the sport no longer shall be eligible to enter collegiate athletics in that sport.

Wouldn't you agree that it is very difficult to know whether you need advice until you have ever had some advice on whether you need advice?

Mr. PATERNO. I cannot disagree with you on that. I think it is a very tough rule, and I do not think it is fair. And I am just speaking personally, not for——

Mr. SCHEMBECHLER. I am not sure that has ever been enforced by the NCAA.

Senator Specter. But its presence is certainly a chilling factor.

Mr. SCHEMBECHLER. Sure. Right.

Senator SPECTER. One or two final questions. Coach Schembechler, in your opinion, from Herschel Walker's personal point of view, did he make a mistake?

Mr. SCHEMBECHLER. Only he can determine that.

Senator SPECTER. That is why I am asking for your opinion.

Mr. SCHEMBECHLER. Well, in my opinion——

Senator SPECTER. If you had been Herschel Walker——

Mr. SCHEMBECHLER. If I had Herschel Walker?

Senator SPECTER. If you had been Herschel Walker—no, if you had Herschel Walker, I have an idea as to what your——[Laughter.]

As to what you would do.

Mr. SCHEMBECHLER. I can tell you this, I probably would have followed him around day and night. [Laughter.]

No. My own personal opinion is that it is yet to be proven whether it was in his best interest to leave at this time.

Now, I had always looked at him, and in talking to his coach, that he had the ambition in college athletics, both in football and track, and that he was enjoying himself in school; that he was making progress toward a degree, and that possibly in his best interest he should have stayed in school.

By the same token, even if it would have been in his best interest to leave, that is only one individual. The rules are set up for the vast majority of the other people, and I do not believe that it would have hurt him that much to finish his senior year in college.

Senator SPECTER. Coach Paterno, how about it? Herschel Walker has a $2.5 million offer. If he plays in his senior year in college, he may be injured, never get a dime. From his personal point of view, aside from anything else, do you think he made a mistake?

Mr. PATERNO. Well, I would hate to answer that yes or no.

I think that as far as getting injured——

Senator SPECTER. You are not on the stand.

Mr. PATERNO. He can have insurance. Our outstanding running back, Curt Warner, negotiated an insurance contract to protect him in case he got hurt in his last year; did it on his own.

Senator SPECTER. Who paid the premium?

Mr. PATERNO. His family borrowed some money on a little home they have down there, and I think it was about $3,000 a year. I do not know exactly what it is. And he was allowed to do that. I think anybody has the right to take out insurance on contingencies that he may not be able to fulfill some potential, either as a lawyer or as a football player.

I think that the problem is not whether Herschel Walker did what was best for Herschel Walker or not best for Herschel Walker. I think that probably is when you are talking about human rights.

I think the fact is that we are concerned about jeopardizing the system that made it possible for Herschel Walker to be in a position where he is worth $2.5 million. That is my concern. My concern is that if we now allow this to happen and pretty soon we start to see the disintegration of the type of football we have had.

Then I think the future Herschel Walkers will not be in a position to demand the kinds of money that he was able to get. And I think all of us have to make certain sacrifices if we are going to—

you know, if we are benefiting from a system, I think then probably we have some concerns about our responsibility to that system.

And I think that is the purpose of your proposed legislation, and I think that is the reason we are so supportive of it, is that if we can find some accommodation wherein that we can get a Herschel Walker an opportunity, if there are extenuating circumstances, without disrupting the system that we have had, then I think we will be further along the line.

I think we have to, if we are going to keep the public's trust in the kind of football that we have.

Senator SPECTER. A last question: Is this proposed legislation now obsolete in the sense that the deal really has already been made between the league and the college association? Is it boiling down to a hit-and-run case? The league took Herschel Walker, gave him the credibility, enhanced its receipts, the arrangement has been put back together between the college and the league, and we do not now need to be worried about Marcus Dupree or anybody else?

Mr. PATERNO. I have spent a lot of time talking with a lot of head football coaches in the last three weeks about what might happen as a result of what Herschel Walker does. I think you have to put yourself in the shoes of a football coach who is the coach of another team in that league, and all of a sudden Herschel Walker is dominating that league. And I am a competitor. And Marcus Dupree is out there. I am certainly going to do everything I can to make sure that Marcus Dupree would think about coming to my ball club so that I could be competitive.

And I do not see—there are some people in that league, one of whom, without mentioning names, coached a nearby football team in this city, who is a very aggressive, very ambitious, very competitive coach and general manager, and may be president of one of the clubs in the USFL.

And I would doubt very much if he is going to sit by and let Herschel Walker dominate that league. He will make similar arrangements to see that Dupree is tested and that Dupree will test the court. We have not solved the issue. I mean, the issue still comes down to every time somebody challenges the USFL or the NFL and threatens legal action, where are we?

Now, if we cannot get some help from the Congress, then obviously we are in a whole new game. I mean, we have changed the game. And we do not know where we are going with the new game yet. And that is—and it may not be as harmful as—somebody was comparing it to basketball. But, you know, basketball is only 20, 22 clubs. We are talking now 40 football teams.

We are talking the possibility of 44 because the USFL is thinking of four more expansion teams. We are talking about squads of 50 and 55 people. We are not talking about squads of 10 or 11.

Bo made a very good point, that the fact that the football players do not have time to hone their skills, as they say. A basketball player can play basketball year around. He can go out 1 hour a morning in the summertime and go to the playground.

Football players do not do that. The ability to evaluate football players, as good as so and so, there are too many extenuating factors. How good was his offensive line? How good was the competi-

tion, and so forth. Where, in basketball, your Moses Malone goes out there and he plays against Dr. Irving, Julius, and they go out there and they play. And you can make a pretty good evaluation as to which one—whether he is going to be competitive as a pro.

So we have a much bigger, more vast problem than basketball has.

Senator SPECTER. Coach Paterno, I think you summarized the problem very well when you said you came to Congress for help. The matter will be thoroughly considered.

Coach Schembechler, we very much appreciate your being here. Coach Paterno, we appreciate your being here. And as Senator DeConcini has said the leadership you have provided is really exemplary.

Additionally, Coach Paterno, I want to commend you and Jerry Sandusky for your work with the Second Mile, which provides a home for boys in need of support. And that is a very wonderful project you have. And as chairman of the Juvenile Justice Subcommittee, we have had many hearings in this room on that subject and that kind of activity is really superb.

Mr. PATERNO. I cannot take any credit for that. That is just a superb young man, Jerry Sandusky, who has a tremendous interest in young people.

And I would like to say, Senator, I am very proud of the fact that the Senator from Pennsylvania has instigated this action because I think it is going to be very helpful if we can get it through.

Senator SPECTER. Thank you very much.

Mr. PATERNO. Thank you, Senator.

Senator SPECTER. Thank you, gentlemen. Thank you.

I call the next panel: Mr. Ed Garvey, executive director, NFL Players Association; Mr. Mark Murphy, player representative, the Washington Redskins; Mr. Charles Grantham, executive vice president, the National Basketball Players Association.

Thank you very much for joining us, gentlemen. We very much appreciate you being with us.

Mr. Garvey, we welcome you back. You have been in that chair on a number of occasions recently on other antitrust issues, and we understand that you have a commitment that you must be out by 11:30, so we will start with you.

STATEMENTS OF EDWARD R. GARVEY, EXECUTIVE DIRECTOR, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION; MARK H. MURPHY, PLAYER REPRESENTATIVE, WASHINGTON REDSKINS; AND, CHARLES GRANTHAM, EXECUTIVE VICE PRESIDENT, NATIONAL BASKETBALL PLAYERS ASSOCIATION.

Mr. GARVEY. I would like to thank you, Senator, and also congratulate you on your wisdom last year with respect to the NFL's antitrust exemption request, and at the same time, question your judgment on holding a hearing on St. Patrick's Day. And on behalf of Mark Murphy and myself, we would like to suggest that in the future you take the Irish constituency into consideration before you schedule these things.

Senator SPECTER. I have to defend on that. I take the Irish constituency into account all the time. They thought this would be a good event to supplement St. Patrick's Day. [Laughter.]

Mr. GARVEY. This was my first indication there are no Irishmen in Pennsylvnia. [Laughter.]

But, be that as it may, we are pleased to be here, and we represent, as you know, the players in the National Football League, the Major Indoor Soccer League, and the North American Soccer League. These are all professionals, and we do not represent amateurs, but then no one else who testifies here today represents amateurs, either.

This NCAA does not involve the students in the formulation of the rules, at least at the national level, and it is unfortunate that the athletes about whom much has been said today cannot be here to speak.

And our feeling is that given the experience we have with the players—and Doug Allen is here, former Penn State player, and Brig Owens from the University of Cincinnati; both of them said, by the way, that Penn State and Michigan may not be typical of all the schools in the NCAA, particularly when it comes to the question of whether or not the athletes get their degrees.

But we thought it would be helpful to briefly review the rules, and with your permission, I will submit our statement and just highlight it, if that is all right.

Senator SPECTER. Your statement will be included in the record, and it is our practice to ask, as you know, for a summary, so we can leave the maximum amount of time for questions.

Mr. GARVEY. Fine. The current rules in baseball—of course, baseball does not require a degree, other than high school. Hockey never has had an educational requirement that we know of. The NBA, ever since the *Denver Rockets* decision, which of course Mr. Grantham will speak to, has allowed the college athletes to come in.

The NFL has ignored the decision in the *Spencer Haywood* case under the heading of *Denver Rockets*. I would like to read just one paragraph from that decision by Judge Ferguson. "The harm resulting from a primary boycott such as this is threefold: first, the victim of the boycott is injured by being excluded from the market he seeks to enter; second, competition in the market in which the victim attempts to sell his services is injured; third, by pooling their economic power, the individual members of the NBA have in effect established their own private government."

And I think that is really the problem. The NFL has established its own private government with respect to rulemaking. It says that the player must finish his eligibility. They are careful not to say that he must get his degree. As has been testified, our figures show that actually over the past 20 years approximately 34 percent of the players do have their degrees; that means 66 percent do not.

So the question that the NFL and others look to is eligibility, not education.

NFL RULE

Senator SPECTER. Mr. Garvey, are you convinced that the NFL rule is violative of the antitrust laws?

Mr. GARVEY. I do not think there is any doubt of it, and I think privately the NFL lawyers would agree. In 1977 they at least discussed with us the possibility of agreeing with them with respect to those rules, and we felt that under the *Denver Rocket (Spencer Haywood)* decision it was so clearly illegal we could not agree.

Senator SPECTER. If that is so, why has the rule stood so long without challenge?

Mr. GARVEY. Well, I think in large measure it is because the athletes do not want to take the risk of being blacklisted by testing the NFL rules in the courts.

And, as you know, Senator, the possibility of bringing an antitrust case today means thousands of dollars and years and years of efforts. Any college athlete who looks at the possibility of challenging the rule, I think, thinks better of it and tries to finish his college eligibility and then be prepared for the draft. I think it is a question of money.

Senator SPECTER. How about the association challenging it? Would you not have standing?

Mr. GARVEY. Well, I do not think we would have standing, and the last time we discussed this with our players, they just felt that this was not something that veteran players would necessarily want to fund. And we would actually be going out looking for college athletes who wanted to test it. That has not been our practice. We have been more concerned about the rules once they are in the National Football League. But I see no valid reason why someone has not. If you think about it, the common draft was around for 50 years before Jim "Yazoo" Smith challenged it.

It is almost unbelievable that no one challenged the draft before that time. It was a unilaterally imposed, group boycott, as the court found, yet no one brought a challenge.

Senator SPECTER. Well, it raises a question. There could be explanations, as you have suggested, for the absence of a challenge. It also raises a possible inference that it is not an illegal practice.

It may raise an inference beyond whatever the lawyers may think—and we have been known to differ, and we have been known to be wrong—that it may be a practical rule that works fairly well, when balanced with a tremendous number of other complicated factors.

Mr. GARVEY. Well, it may well be, but I do not think it is if you look at it carefully because what happens here is that, as Judge Ferguson says, you have this private government, the NFL saying, it is in our interest to keep the farm system happy.

They want to make sure that the coaches at the college level do not try to boycott the NFL or keep their scouts out, or whatever. The colleges promote the college athlete. He becomes a star and he comes into the NFL ready to play. The coaches you just heard do such a good job that the players can step right out and they do not need any on the job training; they are ready to go.

So, the NFL likes the system the way it is. It promotes its own draft which is another boycott. It says that if you are going to play

for the NFL team, you must play for the team that selects you. So it is in their best interest, and they do not, as the NBA did for awhile, even look at the economic circumstances of the individual involved.

Senator SPECTER. What is the legal status of the draft?

Mr. GARVEY. Well, the draft, at this point, we believe, as a result of a collective bargaining agreement, which incorporates the draft, would be covered under the labor exemption to the antitrust laws. So I think that the common draft at this point is protected.

Senator SPECTER. As a matter of public policy, is that wise? The antitrust laws apply generally. You articulate a proposition which exempts the draft under labor procedures. Should Congress take a look at that?

Mr. GARVEY. I would not mind if they did and broadened it for labor and restricted it for management, but I think that the court——

Senator SPECTER. It might work the other way. [Laughter.]

Mr. GARVEY. Yes, that is what I am afraid of, so I would just as soon you leave it alone at the moment. [Laughter.]

The U.S. Supreme Court has been pretty clear on it. If the union, as a result of arms length, good faith collective bargaining agrees with management on a restriction, then one court at least—not the Supreme Court, but the Eighth Circuit Court of Appeals has said in the *Mackey* case that the provisions could not be challenged, believing that those in the industry are the best ones to judge it.

But here, if you take a look at the draft——

Senator SPECTER. There are a lot of dissidents beyond those identified players in the industry. A lot of people may not like that at all.

Mr. GARVEY. Well, that is right. That is right, and I do not think that the draft would be immune from antitrust attack from a college player who is coming in, saying, wait a second, you do not represent me because I was a college student when you reached this agreement.

So it is quite possible that if Willie Young, for example, had decided to challenge the draft in the NFL, he may have been successful because the court in *Mackey* was careful to say, it is immune only as to those who are in the bargaining unit.

And so it is quite conceivable that some outside source could challenge the draft.

Senator SPECTER. Is it in the economic interest of those in the bargaining unit to agree to that rule. Could not the players——

Mr. GARVEY. No, it was not.

Senator SPECTER. So, why did you do it?

Mr. GARVEY. Well, we did it because in the give and take of collective bargaining——

Senator SPECTER. You got something else that was worth it?

Mr. GARVEY. Well, that is right.

Senator SPECTER. What did you get that was worth it?

Mr. GARVEY. Well, I do not want to expose all my secrets, Senator. I have already told you I am Irish. That is a heavy enough burden. But I think——

Senator SPECTER. You are not under subpena.

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Mr. GARVEY. If you look at the entire collective bargaining process, you would have to say, if you look at the pension benefits and injury protection, severance pay, all of those benefits in addition to a relaxation, to some extent, of the draft rules and the reserve system, as well as an increasing scale, those things, the players felt, were sufficient to justify allowing the draft to continue. We did try to protect the college players, somewhat, trying to model ours on the NBA settlement in the *Robertson* case, by saying that if the teams offered a long-term contract, then they would have to guarantee portions of that contract.

We have not been too successful on that, but a rather dramatic change occurred in this last collective bargaining agreement. Now the union will negotiate individual contracts, not the individual agent or the player absent union permission. So we can impose some of those protections in the future.

Senator SPECTER. What is your sense of the overall operation of the antitrust laws? The Congress speaks with great infrequency and the interpretations are made by the courts. Should the Congress be more active in this area? Should we express mainfest legislative intent because the courts are guessing at what we really mean?

Mr. GARVEY. Well, that is a tough question. If it comes to sports, I guess I would at this point say that there is not a burning need for the Congress to speak out. If S. 610 is an example, I would say no. We oppose this bill because it does not address the real problem. The real problem is in the NCAA rules that are made by those who are protecting a big business called college athletics.

Senator SPECTER. Well, what should the Congress do about that?

Mr. GARVEY. Well, it seems——

Senator SPECTER. Are those rules consistent with the antitrust laws?

Mr. GARVEY. I do not believe so, but I do not know that they have been tested. But, for example, when——

Senator SPECTER. And again, why not?

Mr. GARVEY. Well, I think if you take the recruiting practices that go on, let us say at the high school level; if you are a great athlete at the high school level, you are recruited by 200 or 300 colleges to come to their school. And why? If you look at the money that is involved today in NCAA sports, I think you start to get some feel for it. I refer in my testimony to the Big East Conference, which did not exist 5 years ago, and just the other day signed an $18 million cable television contract. It gets $9.8 million from ABC and CBS.

Each member school will be getting over $1 million a year from televised sports. Well, that is big business. And so they are out recruiting these athletes to make sure they come in and make sure that their programs do well.

Senator SPECTER. What are your thoughts on Coach Paterno's comment concerning the tremendous benefit for Herschel Walker and other students in being able to go to Georgia and other schools? Does it work well not only as a two-way street, but as a super highway?

Mr. GARVEY. I agree with Coach Paterno on many things, but I certainly disagree with him on that one. Herschel Walker, by some

of the estimates, brought in up to $8 million to the University of Georgia. I saw on one of the interviews where a young college student was asked, "Well, what do you think?" she was at Georgia "What do you think about Herschel leaving?"

She said, "Oh, I think it is too bad. We now have lights at the stadium, and so on and so forth. And so he was a real contributor."

Senator SPECTER. But how about——

Mr. GARVEY. I think he contributed much more——

Senator SPECTER. But how about as the program works its' way down the line and benefits so many other college players and benefits, perhaps high school players?

Mr. GARVEY. Well, obviously I believe that the college experience benefits the athlete as it does the nonathlete. I would be the first one to say that it does. But I do not think that is really the question, nor do I think that the bill approaches the real issue.

What the two coaches were saying is, "Gee, if you will pass this bill, somehow things will be all right." But really all this bill says is that the USFL and the NFL can make their own rules. So if the USFL next year says, if this bill were to be enacted, we have decided to change our mind and now you can go after, as Chet Simmons has clearly defined it, those who are emotionally and intellectually ready, then the coaches would have no protection.

The problem we have with this is that it just goes right to giving the sports leagues even more authority than they now enjoy. And I suspect that some sensible rules by the NCAA would discourage the athlete from going professional; if, for example, they did not, as the rules say, prohibit 4-year grant in aids to the college athlete who comes in; if they did protect him in the event of injury, let's say, for worker's compensation.

Why should not a player who becomes a paraplegic from a football injury have the benefit of the Pennsylvania worker's comp statute? It seems to me he should. Why not say that he gets the minimum wage or some other benefit so that he can stay in school, continue to provide revenue for the university through television and gate receipts, and yet not have to make that tough decision to turn professional.

Senator SPECTER. Would the minimum wage be enough?

Mr. GARVEY. Well, I think that——

Senator SPECTER. What does that do to professionalism?

Mr. GARVEY. Well, the college athlete is a professional, and I think it is time that we just admitted the fact that he is a professional, but others who have their own interests at stake define him as an amateur.

It is like the Olympics. I guess if you take expense money or they put it in a trust fund so that you get it after the Olympics, you are not a professional, but in the NCAA when you think of the payment—you are getting paid, but you are not really getting paid, according to those who set the rules.

So if he were to get a minimum wage for the 8 hours that he puts in every day, at least he could cover some of his expenses, in addition to the scholarship that he receives.

Senator SPECTER. Let us turn to Mr. Mark Murphy at this time, if we may.

Mr. Murphy, welcome; thank you for joining us and for your testimony.

Mr. MURPHY. It is nice to be here on St. Patrick's Day. I will try to be very brief. I will just introduce myself. I am a graduate of Colgate University. I am proud to say that of all Colgate athletes in the NFL, we have 100 percent graduation rate, all two of us. [Laughter.]

I have been in the NFL for 6 years; I am currently player representative with the Washington Redskins and a member of the NFLPA executive committee.

I am an MBA student at the American University here in Washington, and this is my fifth off-season I have been in school, and currently in my last semester. I believe very strongly in college athletes getting an education. I also agree with you and the way you have termed your bill is that college athletes do need to be protected.

However, I do not feel that giving the professional sports leagues an antitrust exemption is the best way to protect college athletes.

One of the things that has always bothered me since I have been in the NFL is the low graduation rate of NFL athletes. We have heard figures of 29, 34 percent, whatever it is; it is very low. Roughly a third of the players have degrees. One of the things I have looked at in my years in the NFL is why is it so low. Who do we blame?

I think the athletes themselves, to some degree, have to be blamed. I think they are naive. I think they are foolish enough to believe that they do not need an education. One of the things that I think hurts is lots of times you see in the papers, you will see quotes from people, well, I do not have to worry about anything for the rest of my life. I signed a multiyear contract.

Well, the money is going to leave very quickly, and sooner or later you are going to be out of the pro leagues, no matter how great you are, and you are going to need an education. I think a lot of players overlooked that and really became—become a little bit naive about how important an education is.

I think the schools themselves are to blame, to a degree. They put enormous pressures on a player. A lot of time is taken up, and I think they put a lot of pressures on a player, and I think that often times education is not put first for the athletes.

I think the professional teams are also at fault. Scouts come around and make promises to players and make them believe it is going to be an easy time for them in the NFL, and that certainly is not the case. The average period in the league is only 4 years. It is very difficult to make it.

Senator SPECTER. What representations were made to you?

Mr. MURPHY. No, I went to a school—Colgate—which has very few players in the NFL. During my senior year at Colgate, even though I was not drafted—I was a free agent with the Redskins—I had several scouts come around and tell me that I should put 100 percent of my efforts into football, that I would be drafted very high.

They told me that I had to put all my efforts into football. Concentrate on football and have a very good chance to have a long career in the NFL. And I was not even drafted.

I can imagine what the pressures are that are put on by scouts for players at larger schools.

So really——

Senator SPECTER. Did you encounter any of those so-called unscrupulous agents?

Mr. MURPHY. Not really. I had agents come around, but I did not see any unscrupulous agents. Maybe I—I do not know. I was fortunate in that.

Mr. GARVEY. You cannot get to Colgate.

Mr. MURPHY. That is right. Colgate is in the middle of upstate New York. It is usually snowing. It is hard to get in. [Laughter.]

Senator SPECTER. You have a very beautiful campus. You are at Hamilton, New York?

Mr. MURPHY. Hamilton, New York.

Senator SPECTER. I had occasion to visit Hamilton with my son, who considered going to Colgate.

You say that college athletes ought to be protected. What would you suggest we do to protect them, if anything?

Mr. MURPHY. Well, I do, at the end of my testimony I have specific suggestions.

Senator SPECTER. Fine.

Mr. MURPHY. I skipped through that. Just the main point is that even if you are an athlete who believes very strongly in education, the time constraints and the demands put on the college athlete are so significant that it is very difficult, even for the well meaning student, the student who is very serious about his education, to get his degree. And the last reason is the agents themselves, the agents that come around with promises, gifts, and money.

And I think they falsely lead the players into believing that, yes, they can make it in the NFL, that it will be easy; there will be a pot-of-gold out there, and often that is not the case.

Suffice it to say that in the NFL, which does have the college eligibility rule, even with that, only 34 percent of the players have their college degrees. So, really, the college eligibility rule has not helped the college athlete. What it has really done is protect the league and the colleges themselves.

I would like to just read through—I have several suggestions that I think would help and would protect the college athlete.

No. 1: Make scholarships for 4 years, or possibly even longer because of the red shirt problem. Often times athletes are red shirted in the sophomore or junior years and end up going to school for 5 years.

I would make grant in aids available for athletes who come back after they have been in the NFL or USFL to allow them to finish their education. I commend the USFL for what they have done with the educational reimbursement. I think the NFL should try to do that. I have tried to get that in my personal contract for graduate school, but it is a policy the NFL will not follow currently. I think that would be a good policy for the league to follow to make sure the students do go back and get their undergraduate degrees.

No. 2: I would like to see some sort of increased injury protection. One of the things that worries college athletes is incurring an injury. Often times you hear players say, if I get hurt now, I will never get a chance to play professional football.

And that is a fear that all athletes live with.

Limit the number of times scouts can visit colleges. That would eliminate many hours on the field that could be devoted to studies.

Senator SPECTER. How could you do that?

Mr. MURPHY. How could you set a limit?

Senator SPECTER. Yes.

Mr. MURPHY. Well, I do not know if it would be done through the NFL or the NCAA could establish guidelines. I am just throwing these ideas out. I do not know exactly how they could be——

Senator SPECTER. Well, it is an interesting idea. I pause for a moment to reflect on the difficulty in saying to someone that he cannot go onto a college campus or cannot speak to someone. Our rights of free access and freedom of speech are very broad in this country, as they should be. Do you think such a rule would be constitutional?

Mr. GARVEY. Well, he is talking about scouts. And I think you could set up a day or 2 days where all the scouts from the pros would come in and, because they use the athletic facilities to do the testing, and I think you could say, you cannot use the facilities any other day.

Senator SPECTER. Well, you could do that, but the scouts would not necessarily be bound by such a rule.

Mr. GARVEY. No, but I think if the schools really tried, they could put some pressure on them, because now you have scouting combines that represent as many as 15 NFL teams. So really what happens is then some of those members try to get an edge on the other ones.

So, while Al Davis may belong to one combine, he wants to also have his own scouts going around. And if the coaches do not cooperate, then I think the athletes would have a better opportunity.

Senator SPECTER. You were able to keep your telephone in service all during your college career, Mark?

LIMIT BOWL GAME PARTICIPATION

Mr. MURPHY. Oh, yes. My wife—my girl friend called me a lot, but not a lot of agents or scouts.

Another thing I think would be helpful would be to limit the number of college all star games that athletes can play in. I know a lot of players on the Redskins that I have talked to and players who are very intelligent and pursued their education were forced to drop out of school their senior year, the spring semester, because they played in a bowl game which took them into the middle of January, and then they wanted to play in some all star games beyond that.

It really made it impossible for them to stay in school.

I think also another help would be to put restrictions on agents, limit the number of visits, and disqualify any who would offer money to players to sign contracts before they are drafted.

Tie the number of scholarships a college may give out in any given year to the number of athletes who graduate the previous year. My idea here is to reward the colleges that encourage the athletes to finish and punish those who do not.

And, finally, provide athletes with counseling and some sort of informational program about agents, scouts, professional leagues to give them an idea what to expect because it is, for many athletes, something that obviously they had never been through before, and I think at least if they have some information and knowledge of what to expect, I think it will make it a lot easier transition for them.

Senator SPECTER. Thank you very much, Mr. Murphy.

Mr. MURPHY. Thank you.

Senator SPECTER. I would like to turn now to Mr. Charles Grantham, executive vice president of the National Basketball Players Association. Prior to joining the league, he was director of admissions and financial aid at the Wharton School, where he received his MBA with concentration in labor, and he has both played and coached college basketball.

Welcome, Mr. Grantham. We look forward to your testimony.

Mr. GRANTHAM. Thank you.

Mr. Chairman, my name is Charles Grantham, and I am the executive vice president of the National Basketball Players Association. I am pleased to have this opportunity to appear before the Senate Judiciary Committee to present the players association views on S. 610, the Collegiate Student-Athlete Protection Act of 1983.

On behalf of the players association, I would first like to publicly commend Senator Specter for the leadership he has shown over the last 2 years with respect to legislation affecting the application of antitrust laws in professional sports.

He has, quite wisely in our view, consistently stated that Congress should not enact any laws which provide a wholesale exemption from the antitrust laws for sports teams or leagues.

The players association is most appreciative of his efforts in this regard. However, with all due respect to the Senator, the players association has concluded that it must voice strong opposition to the S. 610 and urge that this committee not recommend its enactment.

The players association has more than 13 years of experience in dealing with the precise issue which is before the committee today; that is, whether application of the antitrust laws to league rules governing the signing of college athletes is a positive or negative thing. Indeed, basketball faced the Herschel Walker problem in 1971 when Spencer Haywood challenged the NBA rule which was substantially identical to the NFL's rule governing the signing of college players.

POSSIBILITY OF BEING BLACKLISTED

Senator SPECTER. On his challenge to that rule, did he face the kinds of action which Mr. Garvey has described: The possibility of being blacklisted or unduly lengthy litigation?

Mr. GRANTHAM. Yes; I think all athletes at that time faced that situation. The problem is that the length of an average professional career is always at stake. I think most athletes are concerned about being tied up in litigation for 4 or 5 years before he is actual-

ly able to play a ballgame. The impact on an athlete's career of 1 or 2 years is more like 15 or 20 of the working man's career.

So, at that point, yes, he did face that.

Senator SPECTER. But he took it on? He beat the system, so to speak.

Mr. GRANTHAM. He beat the system, yes.

Senator SPECTER. OK. Proceed.

Mr. MURPHY. You know, one thing I think might be important to note is that when Spencer Haywood challenged that, there was a competitive league. So, he had an alternative to the NBA.

In most of the years that the NFL has had the rule, there has not been a competitive league. And really, if you do not play in the NFL in the United States, you have no other alternative. So, I think that might have deterred some athletes from challenging that.

Mr. GRANTHAM. Most definitely.

Basketball has devised a workable solution to the problem. Our experience has convinced us that the antitrust laws do not pose any barrier to the establishment of fair rules in this area, and indeed, that these laws play a critical role in insuring that the rules which are adopted do not deny the rights of student athletes.

The rule governing the signing of college players was an outgrowth of two antitrust cases, the *Spencer Haywood* and *Oscar Robertson* cases, that players brought against the NBA owners in the early 1970's.

The rule was first established by an agreement that settled the *Oscar Robertson* case. The players association believes that the modified college eligibility rule agreed to in the *Robertson* case has been a tremendous success. It provides that any player whose high school class has graduated may renounce his remaining college eligibility 45 days prior to the annual NBA draft and thus become eligible to be drafted and signed by an NBA team that year.

Initially, some colleges expressed a concern that this rule would cause a flood of players to leave school before they completed their college eligibility. In this case it has not happened. The fact is in each year in which the revised rule has been in effect, only a handful of exceptionally talented basketball players have exercised their option to renounce their college eligibility and sign with an NBA team.

As a result, the rule agreed to in the *Robertson* settlement has not had any adverse effect on the colleges. To the contrary, college basketball with its two network television contracts and record fan interest has never been more popular or prosperous than it has in the years since the *Robertson* settlement agreement has been in effect.

Senator SPECTER. Do you think football is different from basketball? Do you agree with Coach Paterno or disagree with his assertion on that point?

Mr. GRANTHAM. No; I do not think it is different because you are still dealing with the concept of freedom of choice. We represent a microcosm of the professional sports industry and I think proportionately you would not see the flooding of the gates that he is probably implying.

The reason why the NBA's revised college eligibility rule has been so successful is that it has benefited all of the parties affected by its operation. Student athletes, of course, have benefited from being given the opportunity to decide for themselves in the particular circumstances confronting them; is it was in their best interest to leave school early and sign with an NBA team, rather than risk a career ending injury while completing their college eligibility.

Each year a few exceptional players, such as Magic Johnson, James Worthy, and Terry Cummings have determined that it was in their best interest to exercise this option. By the same token, other student athletes, such as Ralph Sampson, have benefited by the revised rule by having the opportunity to decide for themselves not to leave school early.

The right to choose when and for whom one will work is the basic right which the revised NBA rule preserves for all student athletes.

Similarly, the NBA owners have benefited from the revised college eligibility rule by gaining the opportunity to generate the heightened media attention and fan interest occasioned by the signing of college superstars, such as Magic Johnson.

Indeed, even the colleges have benefited by virtue of the increased attention focused on their basketball programs as a result of such signings. The fans, of course, have gotten the best of all worlds, a vital, exciting college basketball program, and a dynamic, star-filled professional league.

Senator SPECTER. Mr. Grantham, does the experience in basketball shed any light on whether more students graduated before the Spencer Haywood case or after, or does it make any difference, or do you know?

Mr. GRANTHAM. I do not think it makes any difference. I think what we have experienced——

Senator SPECTER. Do you have any statistics on it? How many players in the National Basketball League have graduated since the Spencer Haywood case, if you know?

Mr. GRANTHAM. I cannot give you year by year statistics. I can only tell you that today approximately 55 percent of our athletes have degrees. Now, the difference is——

Senator SPECTER. Do you know what percentage had obtained degrees prior to the Haywood rule?

Mr. GRANTHAM. I do not know definitely, but I think it was somewhere between 45 and 50 percent.

We believe that the positive experience of professional basketball with the rule permitting student athletes to decide for themselves whether to complete their college eligibility demonstrates that there is no need for a new antitrust exemption in this area.

Moreover, the owners' antitrust exemption provided in S. 610 is completely unnecessary to accomplish the bill's stated goal of encouraging student athletes to complete their college education.

I have been assured that league programs which truly only encourage student athletes to get a degree would not violate any antitrust law policy. Employee scholarships, programs reimbusing tuition expenses, and other educational benefits are available in many industries, but simply nonexistent in the NBA and most other professional sports leagues.

This is not because of any antitrust problem, but simply because the owners have no desire to provide such benefits. By contrast, the players association has participated in a number of programs designed to encourage NBA players and high school athletes alike to get a good education. No one knows better than the players association that a player's career is all too short and that success in later life is likely to be far more dependent on his education than upon his sports accomplishments.

For this reason, the players association has participated in two separate programs designed to provide NBA players with college and career counseling, something that they need so badly.

Even more importantly, however, is the problem of high school athletes who drop out of school with visions of a professional sports career. The players association is proud to be one of the cosponsors of a group that encourages high school student athletes around the country to chase the dream but to catch an education in the process.

In sum, the players association opposes S. 610 primarily because we believe that our experience with college eligibility rules demonstrates the danger of giving league owners the authority to establish whatever rule best serves their economic interests.

Senator SPECTER. Do you think that if this bill were enacted the professional basketball league would change its practice and go back to a rule like the NFL's?

Mr. GRANTHAM. I think they would seek such a change.

Senator SPECTER. You think they would?

Mr. GRANTHAM. Yes.

Senator SPECTER. Why would they, if the current rule is working so well?

Mr. GRANTHAM. Well, I think the whole concept of depressing the value of a player is a resultant factor. If, in fact, you can control rookie entry to the market you can reduce the price you pay for rookie player services.

Senator SPECTER. But does not the league profit enormously by having Magic Johnson available earlier?

Mr. GRANTHAM. Yes, they do.

Senator SPECTER. So, why would they want to go back to the old rule?

Mr. GRANTHAM. Because I think the concept of paying Magic Johnson a price to come out of school earlier is far greater than they would have to if he was drafted right out of school.

Senator SPECTER. All right. Proceed.

Mr. GRANTHAM. Let me also shed a little light, on our system by citing a few statistics, if I might, which I think might be helpful to you. Today about 400,000 high school players play high school basketball. We got that from a source at the National Federation of High Schools.

There are 1,253 four year-colleges, of which probably approximately 15,000 college basketball players participate. Yet, we have about 40 rookies who make it into the NBA each year. And of that 40, approximately 4 or 5 very talented individuals have renounced their college eligibility and have come into the league.

So, while I think the college coaches have a concern, I think they are overreacting when they say a flood of college athletes will turn pro early. This is not a very realistic position.

I think that the concept of legislation should be to encourage education not discourage competition. The problem is not the leagues rules, but it is education. As was pointed out early, young athletes are courted from 7th grade through 12th grade.

The problem is educating them on their choice. We feel that education is really the problem, and I think that what we have done with the players association is to get out and help educate high school kids to help educate them about their choices.

Legislation does not give that education.

Senator SPECTER. Did you cite a statistic as to how many college players had signed prior to the time that their eligibility had lapsed?

Mr. GRANTHAM. I did not hear you.

Senator SPECTER. Did you cite a figure as to how many college players had signed before their eligibility ended in college?

Mr. GRANTHAM. Yes; in 1976—from 1976 on, we have had 40 players.

Senator SPECTER. Forty?

Mr. GRANTHAM. Forty college players declare for the college draft. Today, I think there are about 26 still in the league. Most of them were No. 1 draft picks. The significance of that is that the No. 1 draft pick is most likely to make the team.

Senator SPECTER. So, your guess is that if the NFL and the USFL did not have the rule, that there would be a very limited number of football players who would be signed early. There are very few Herschel Walkers around.

Mr. GRANTHAM. Exactly; and we feel very strongly that it is the very few talented individuals who could decide as a junior or a sophomore to renounce their college eligibility and then apply for a professional draft.

Senator SPECTER. How does a student make the decision to renounce his eligibility without consulting with an attorney, if he is following the NCAA rules?

Mr. GRANTHAM. Well, we also think that is part of the problem. Go back to the whole concept of education and the NCAA rules, I think if we finally came to a conclusion, which is a realistic one, that like professional athletics, college athletics has become a very big business, primarily based on television revenues and other things, clearly there is a need for counseling at an early age, 20, 19, to help the student make wise choices.

We should be realistic enough to realize that we should provide counseling for our athletes. Whether it is the NCAA providing it or whether it is the respective labor unions providing it, that type of counsel should be made available to them.

Senator SPECTER. Thank you very much, gentlemen. We very much appreciate your being here.

Mr. Garvey, we may not be right on schedule, but we got you out on time.

Mr. GARVEY. I appreciate it.

Senator SPECTER. Which is something of a rarity in these hallowed halls.

We appreciate your being here, Mr. Garvey, Mr. Murphy, and Mr. Grantham. Thank you very much.

[Mr. Garvey's prepared statement and material referred to follow:]

Prepared Statement of Edward R. Garvey

Mr. Chairman, Members of the Subcommittee:

My name is Ed Garvey. I serve as Executive Director of the National Football League Players Association and President of the Federation of Professional Athletes. The Federation is affiliated with the AFL-CIO and is an umbrella group made up of the NFLPA and three unions representing soccer players in the Major Indoor Soccer League, North American Soccer League and the American Soccer League. I appear here today with Mark Murphy, Redskin Player Rep and NFLPA Executive Committee Member, in opposition to S. 610.

We appreciate your invitation to testify today. At the outset, I should make it clear that we do not represent athletes with college eligibility remaining. Of course, none of your other witnesses do either. I intend no criticism of the Committee for not inviting a spokesperson for the athletes affected by this proposed legislation because unfortunately there are no elected representatives at the college level. Because nearly all our members were so-called amateur athletes governed by NCAA rules, we do have a degree of expertise, however. We do not have a direct stake in the outcome, but we feel strongly that this legislation is not in the best interests of the college athlete.

The NCAA, as the representative of management in college athletics, will undoubtedly want to protect its client by making certain no one dilutes its television package. Great coaches are great recruiters and therefore the American Football Coaches Association may support S. 610. After recruiting talent at the high school level, no college coach wants to see his talented player leave for the pros until his four year eligibility has expired. Loss of a super star would mean a losing season, a missed bowl appearance, less money for the school and maybe the coach's job. Most college coaches

obviously want the NFL, USFL, NBA to stay away. The reaction to Herschel Walker's signing was predictable. The coaches announced that USFL scouts would be barred from their campuses. Maybe if they can't see them the problem will disappear. The college coaches and the USFL will reconcile, of course, because they depend on each too much to do otherwise. The college coaches run the pro football farm system. The coach benefits in this symbiotic relationship because he can promise the likelihood of a pro career to an impressionable high school athlete, using the placement of previous players in the NFL or USFL as evidence to support his claim. Unfortunately, for a majority of the highly recruited high school football players, this promise is empty and far too many end their college days with no degree and no pro career.

The NFL and USFL would welcome unrestricted freedom to adopt any rules they so desire without fear of court review. S. 610 would afford them such an opportunity.

If S. 610 is enacted, millionaire owners can make the rules, relax the rules, make exceptions to the rules and no one could challenge their arbitrary actions. S. 610 would not protect the universities, coaches or athletes. It would merely sanctify any rules the leagues wish to adopt arbitrarily on the subject of recruitment - whether they were reasonable, whether they provided for hardship provisions, due process or not.

Thus, management - NCAA, NFL, USFL, Coaches - undoubtedly applaud the bill. They would benefit but the athlete would suffer.

II. Current League Rules

Ever since the Spencer Haywood decision (Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1971), the NBA has allowed its teams to draft college athletes with remaining eligibility. Given the popularity of college basketball today, it would appear that college basketball has survived that decision quite well.

The NFL has ignored the Haywood decision. Their attorneys privately admit that current NFL rules would not withstand court challenge, but no efforts have been made to comply with the law. Their attitude has always been - "let them challenge us. We have more money than they do."

Baseball, hockey and soccer have no requirements regarding college eligibility. Baseball merely requires a high school diploma, the other sports have no requirement that a prospective athlete acquire a degree. The NASL does not automatically allow high school students to join the League but, in the case of financial need, sensible exceptions are made.

Only the NFL stands above the law, ignoring financially needy players and the law of the land. The USFL apparently wishes to emulate the NFL now that the new league has picked off its prize. No exceptions are or will be allowed should S. 610 be enacted. Once an athlete enters college he cannot play in the NFL for four years if he completes his eligibility, five years if he drops out. No matter if a Willie Young is forced to seek employment to support his family. The NFL says let him go to Canada. Why, they ask, should we jeopardize our wonderful farm system simply because an athlete is in financial need?

Now that the USFL has taken the number one college athlete, they are ready to make peace with the college coaches once again. They too wish to implement an illegal group boycott against all athletes who enter college. Almost every USFL rookie has yet to finish college and get a degree. Is it any less injurious to interrupt a senior year than a junior year? Or, isn't it obvious that "eligibility" is the key to S. 610 - not education.

The March 4, 1983 edition of USA Today carried this story:

> "During a meeting between USFL and AFCA (American Football Coaches Association). . . USFL Commissioner Chet Simmons pledged the league would not sign underclassmen while new eligibility rules are being written.
>
> "College coaches, in turn, welcomed USFL scouts back at their schools. 'We didn't want a war and certainly the pros don't want a war against us. We're their farm clubs,' said coach George McIntyre." (Emphasis added.)

Isn't it wonderful that two groups could get together so amicably and agree upon a group boycott? In our judgment, this combination or contract in restraint of trade is a per se violation of the Sherman Act. Surely, if the NFL draft, unilaterally adopted, was declared a violation of the Sherman Act in Smith v. Pro Football, Inc. 543 F.2d 1173 (D.C. Cir. 1978), an agreement by a multi-employer association and the college coaches to prohibit a group of citizens from seeking employment at what they do best, makes the NFL draft seem almost benign.

The USFL position seems absurd to me. Willie Young, a man in financial need, was not allowed to play for the Chicago Blitz even though he had a signed contract. In addition to voiding Young's contract, Chet Simmons said he "invalidated some 200 contracts" because players had eligibility remaining. He limply explained his approval of the Walker contract by explaining that the situation was "unique" and "extraordinary". In case those adjectives are not self-explanatory, Simmons went on:

> "A very, very special and unique set of circumstances. Herschel is physically, mentally, and every other way ready to play pro football."

Is that the test? That a player be "physically, mentally and every other way" ready to play? We all know it is not. All he means is, "it was convenient, expedient, lucrative and a great stroke" for the league and the USFL owners to sign Herschel. No one tested Willie Young or the 200 other

disallowed players for readiness. Unfortunately for Mr. Young, the USFL owners did not need him, he needed them.

It's back to "business as usual" in football if Congress should enact S. 610. And, the NBA would be quick to follow the USFL and NFL. Quick, that is, unless the popularity of college ball threatened the NBA. Then in their own self-interest, they would again recruit college players.

The punt is that S. 610 does not set standards, it only grants the right to be arbitrary and capricious to the professional sports leagues.

III. NCAA TODAY

Before we examine the fairness or unfairness of the NFL and USFL rules, rules which could be legalized by S. 610, we must take a quick look at the expressed goal of S. 610 and the treatment of "NCAA eligible athlete".

First, the NCAA monopolizes college athletes. Rules are made which impact on athletes, not by athletes, but by university management representatives. The rules are made to protect the athletic program of the member schools. Two sports are profitable: football and basketball; therefore, most of the attention focuses on these two sports. Anything that would impact adversely on the college profit picture will become a major issue for the NCAA.

Great high school football and basketball players do not choose their schools as the non-athlete does. They are recruited by as many as three hundred colleges. Our colleges and universities would not invest in their recruiting program unless there was a return on investment. That return comes in the form of gate receipts, television revenue and alumni contribtuions. It is a business.

Like the NFL, the NCAA seeks a limited form of "competitive balance" not through a professional draft (although we would not be surprised to see one soon), but

through a limitation of scholarships or "grants-in-aid" awards. For football, the limit is 30 grants-in-aid for freshmen, a total of 80 for the football program. Financial need is not the first consideration. Talent comes first.

Second, the NCAA protects its members by making sure the schools are not too good to the athletes. They carefully limit their pay and they prohibit a scholarship that runs for more than one year. These rules, viewed objectively, are designed to guarantee free services for money-making businesses. It is a repeal of the minimum wage law in the name of "sport" or "amateurism".

In the '60's, athletes upset by exploitation, demanded four-year scholarships and, for awhile, many schools gave in. But the NCAA changed that. Now the rule reads:

> "Such aid shall not be awarded for a period in excess of one academic year."

Elaborate rules prohibit or limit any payments. And why? To save money for the schools.

We believe it is unconscionable to limit these athletes to one-year scholarships. What if he or she is too injured to continue performing? Why should the athlete, who raises money for the school, be denied the security of knowing that he or she can finish his/her education?

What about injuries? What does the NCAA provide for the permanently disabled player? We have searched the NCAA Rules and have found nothing that requires a college to continue medical payments or to continue the "scholarship" of an injured player. A recent case is instructive on the attitude of its members. When a college athlete was crippled as a result of an athletic injury, he sought protection under the state Workers Compensation statue. The school fought against the athlete, and unfortunately, won. Thanks for choosing our school, thanks for raising money for us, but please don't expect to complete your degree at our expense or

obtain Workers Comp benefits to help you the rest of your life.

IV. Money Involved

Virtually every day the papers carry news of the college sports business. Penn State and Nebraska will play the first "Collegiate Kickoff Classic" at Giants Stadium in New Jersey. Why did the NCAA permit a rules change to allow an August game? Both schools will receive $500,000 each. A player permanently disabled in that game will not receive any portion of his school's share. Assuming 80 grant-in-aid players on each side, each player will generate over $6,250 for alma mater before the "regular season" gets under way. Penn State's grant-in-aid will be repaid after the second game.

Yesterday the papers reported that Orlando's Tangerine Bowl has been renamed the "Florida Citrus Bowl" because the citrus industry paid $250,000 for the name change. Participating schools will receive $500,000 each next year - up from Auburn and Boston college's anemic $350,000 this year.

Some estimates indicate that of Herschel Walker was responsible for generating $8 million in income for the University of Georgia. What was Herschel paid? A grant-in-aid.

Television has altered our concept of amateurism. The NCAA television figures are instructive:

1970 - 1975: Average $8.6 million
1975 - 1978: Average $15 million
1980 - 1981: Average $31 million
1982 - 1985: Average $70.3 million

Those figure do not include the millions of dollars paid to the Big 10, SEC, ACC and other conferences nor does it cover many of the so-called independent schools.

Yesterday's paper announced that the Big East Conference signed a new $18 million three-year TV contract with Metrosports. In addition, the Big East, which did not even exist five years ago, will receive $9.8 million from CBS and

NBC. Each of the nine schools will receive over one million dollars per year. The same paper announced cable TV coverage of NCAA women's basketball games.

College athletics is big business. What S. 610 suggests, is that big pro sports monopolies should leave collegiate sports monopolies alone.

V. Goals of S. 610 and Reality

The stated purpose of S. 610 suggests a concern about education of our "student-athletes". Why single out athletes? Let's concern ourself with all students.

But let's see how S. 610 would impact on the stated goal. Over the past 20 years, our study of the educational background of NFL players indicate that 66 percent of the players in the NFL did not receive their college degrees. Estimates of the percentage of non-degree players in the NBA reaches 85 percent. Of course, because of the NFL's rules, 100 percent completed their NCAA eligibility requirement. Once again, eligibility not college degrees was satisfied.

It is apparent that the goal of S. 610 would only protect "eligibility", not advance the goal of obtaining a degree. Senator Specter suggested that there is "substantial public interest in a policy to encourage student-athletes to finish college." If so, let us suggest mandatory grants-in-aid that extend until the student-athlete "finishes college" whether he is cut or injured. We pledge to work with you in this area.

Secondly, there is no reason to delegate unrenewable power to professional sports leagues who have demonstrated they are not concerned about athletes finishing college. The concern of the NFL is to keep its farm system operative and to keep its draft functional. And why should they care? They are in business to make money not to educate athletes. We conclude by suggesting that there are serious constitutional issues

involved, and we would be prepared to submit a more extensive memorandum on these issues should the Committee so desire.

VI. A Proposal

We propose the following:

Withdraw S. 610 and rewrite it with the following suggestions incorporated:

1. Require the NCAA to eliminate its prohibition on four-year grants-in-aid;

2. Require Workers Compensation protection for all collegiate athletes;

3. Apply the minimum wage laws to college athletes;

4. Allow those collge athletes in financial need to seek professional employment whenever they desire.

5. Provide financial aid to athletes past four years of eligibility in recognition of the rigorous time demands of big time college athletes.

Prepared Statement of Mark H. Murphy

Mr. Chairman, Members of the Subcommittee:

My name is Mark Murphy. I am a graduate of Colgate University and have been in the NFL for six years. Currently I serve as the Player Representative of the Washington Redskins and I am a member of the NFLPA Executive Committee. I am an MBA student at American University, and this is the fifth off-season I have been in school. I am in my last semester now. I believe very strongly in college athletes getting an education, but I do feel very strongly they need to be protected. I don't feel that giving a professional sports league an antitrust exemption to set the rules is the best way to protect them.

One thing that has always distressed me is the low percentage of college graduates in the NFL, about 34 percent. I think the athletes themselves are often to blame. I think they are a little naive, they believe they can play football forever, and they don't really think about the chance that they may get injured or cut. Obviously, those risks are very real in an industry with a 4.2 year average career. I think the schools are also to blame for putting so many demands and pressures on the athletes, and some of the programs they put them into really don't have the athlete's best interest at heart. The time demands on a college athlete are tremendous. From late August through December for the season; and, the month of January for bowl games; the average player spends 6-8 hours per day playing and practicing.

I think the professional teams are at fault. Scouts come around and make promises to players and make them believe that it is going to be an easy time for them to make it in the NFL. They demand testing to suit their schedule, not the athlete's. I think the agents that come around are at fault

with the promises, gifts, and money. They also hurt the player by taking his mind off of education.

Even though the NFL waits until a player's eligibility is over, only 34 percent of our members are graduates. The rule has not worked to protect the athlete. Only the NFL and the colleges have benefited.

All this to say that playing college football is nearly a full-time job from the first of September right through exam time. It is hard enough to keep grades up without all the other distractions. After the football season, you try to catch up in the second semester only to be confronted with Spring practice. It is extremely difficult for athletes to carry a full load and graduate in four years. As a result, many athletes take light loads and plan to get their degrees in five years. Unfortunately, the grant-in-aid stops after four and all too many never complete their education.

The NCAA seems more concerned with its money-making sports than with actually encouraging athletes to complete their education.

I often wonder, Mr. Chairman, why "amateur" status is so important when it comes to sports. Would a student in the college band or orchestra be disqualified if he or she played professionally in the summer months? Of course not. But the athlete who would get paid to play seems to be violating some unwritten moral code.

I see no way in which this bill would advance the goal of obtaining degrees for student-athletes. It really protects the leagues and the athletic programs without encouraging schools to pay more attention to the athlete's education.

Mr. Chairman, I have several suggestions for helping the student-athlete. I submit them for your consideration:

1. Make scholarships four years, or possibly even longer because of the red shirt problem. I would also make grants-in-aid available for athletes who come back after

they have been in the NFL or USFL to allow them to finish their education. The objective should be to make sure that the athletes get an education. The colleges who profited by their performance should help them complete the process.

2. Some sort of increased injury protection is necessary. One of the things that worries college athletes is a career ending injury in college. "If I get hurt now, I'll never get a chance to play professional ball."

3. Limit the number of times that scouts can visit colleges. That would eliminate many hours on the field that could be devoted to studies.

4. Limit the number of college all-star games athletes can play in. I know many athletes who drop out of school their senior year, Spring semester, because they are going to play in a bowl game and all the all-star games.

5. Put restrictions on agents. Limit the number of visits and disqualify those who offer money to players to sign contracts.

6. Tie the number of scholarships a college may give out in any given year to the number of athletes that graduated the previous year. Reward those colleges that encourage the athlete to finish and punish those who don't.

7. Provide athletes with counseling and some sort of informational program about agents, scouts, professional leagues, and what to expect.

In conclusion, Herschel Walker's signing got a lot of publicity, and while I may be naive, I really don't think his signing is going to set off a lot of others. There will be no stampede. It is just a case of a new league in its first year trying to establish credibility. An exceptional athlete was available. I don't see more than a handful signing before their eligibility is over in any given year.

Prepared Statement of Charles Grantham

Mr. Chairman, my name is Charles Grantham. I am the Executive Vice President of the National Basketball Players Association and I am pleased to have this opportunity to appear before the Senate Judiciary Committee to present the Players Association's views on S.610, The Collegiate Student-Athlete Protection Act of 1983.

On behalf of the Players Association, I would first like to publicly commend Senator Specter for the leadership he has shown over the last two years with respect to legislation affecting the application of the antitrust laws to professional sports. He has, quite wisely in our view, consistently stated that Congress should not enact any laws which provide a wholesale exemption from the antitrust laws for sports teams or leagues. The Players Association is most appreciative of his efforts in this regard. However, with all due respect to the Senator, the Players Association has concluded that it must voice strong opposition to S.610 and urge that this Committee not recommend its enactment.

The Players Association has more than 13 years of experience in dealing with the precise issue which is before the Committee today -- that is, whether application of the antitrust laws to league rules governing the signing of college athletes is a positive or negative thing. Our experience has convinced us that the antitrust laws do not pose any barrier to the establishment of fair rules in this area and, indeed, that these laws play a critical role in ensuring that the rules which are adopted do not trample on the rights of student athletes. I would like to review briefly the history of the NBA's existing rule on signing student athletes, because I believe that this history will convince the Committee that the antitrust exemption contained in S.610 is not only unnecessary, it is bad public policy.

Over 13 years ago, a major effort was begun by the NBA players to challenge a number of league rules which severly lim-

ited the right of professional basketball players to bargain freely for their services in an open and competitive marketplace. One of these rules barred the NBA clubs from signing any player who had not exhausted his college eligibility, whether or not that player had any desire or intention to attend collge. Two suits were filed in the early 1970's challenging this rule on the ground tnat it violated the antitrust laws. In one suit, which was filed by Spencer Haywood in 1971, a federal court in California held that the NBA's rule was overbroad and unfair, in violation of the antitrust laws.[1] Following this decision, the NBA modified its rule by creating what became known as the "hardship" exception, in which a student athlete could become eligible for the NBA draft if he demonstrated that it would impose a hardship upon him to complete his college eligibility.

The other more broadly-based antitrust suit filed against the NBA in the early 1970's was the Oscar Robertson case, a class action instituted on behalf of all NBA players, challenging both the proposed merger between the NBA and the ABA and a variety of league rules which suppressed competition for players. In a 1975 decision, a federal district court found that the NBA rules in question appeared to be blatant violations of the antitrust laws,[2] and this decision convinced the NBA owners to try to settle the case. The ensuing negotiations culminated, in 1976, in what is now referred to as the Robertson settlement agreement. Among other things, this agreement established the modified college eligibility rule and free agency system which is in effect in the NBA today.

The Players Association believes that the modified college eligibility rule agreed to in Robertson has been a tremendous success. It provides that any player whose high school class has graduated may renounce his remaining college eligibility 45

1 Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Calif. 1971).

2 Robertson v. NBA, 389 F. Supp. 867, 893-96 (S.D. N.Y. 1975).

days prior to the annual NBA draft and thus become eligible to be drafted and signed by an NBA team that year. Initially, some colleges expressed the concern that this rule would cause a flood of players to leave school before they completed their college eligibility. This has not happened. The fact is that, in each year in which the revised rule has been in effect, only a handful of exceptionally talented basketball players have exercised their option to renounce their college eligibility and sign with an NBA team. As a result, the rule agreed to in the Robertson settlement has not had any adverse effect on the colleges. To the contrary, college basketball, with its two network television contracts and record fan interest, has never been more popular or properous than it has in the years since the Robertson settlement has been in effect.

The reason why the NBA's revised college eligibility rule has been so successful is that it it has benefitted all of the parties affected by its operation. Student athletes, of course, have benefitted from being given the opportunity to decide for themselves whether, in the particular circumstances confronting them, it was in their best interests to leave school early and sign with an NBA team, rather than risk a career-ending injury while completing their college eligibility. Each year a few exceptional players, such as Magic Johnson, James Worthy and Terry Cummings, have determined that it was in their best interests to exercise this option. By the same token, other student athletes, such as Ralph Sampson, have benefitted by the revised rule by having the opportunity to decide for themselves not to leave college early. The right to choose when and for whom one will work is a basic right which the revised NBA rule preserves for all student athletes.

Similarly, the NBA owners have benefitted from the revised college eligibility rule by gaining the opportunity to generate the heightened media attention and fan interest occasioned by the signing of college superstars, such as Magic Johnson. Indeed,

even the colleges have benefitted by virtue of the increased attention focused on their basketball programs as a result of such signings. The fans, of course, have gotten the best of all worlds: a vital, exciting collegiate basketball program and a dynamic, star-filled professional league.

Significantly, no group -- not the colleges, not the athletes, not the NBA owners, nor the basketball fans -- has complained about this revised college eligibility rule, which has been in effect since 1976.

We believe that the positive experience of professional basketball with a rule permitting student athletes to decide for themselves whether to complete their college eligibility demonstrates that there is no need for a new antitrust exemption in this area. To the contrary, it is only because the antitrust laws prevented the NBA owners from continuing their blanket restrictions that the present equitable system was agreed to.

The Players Association firmly believes that there is no merit to the claim that professional sports is somehow different from other businesses and that sports team owners -- rather than the marketplace -- should be trusted to look out for the best interests of fans, players, competitors, and the public. The fact is that professional sports today is a big business which brings in more revenue than either the recording industry or the movie industry. As such, it is entirely appropriate, and necessary, that sports team owners be subject to the same antitrust restrictions which preserve competition in other businesses. As the NBA experience demonstrates, sports team owners, when left to "regulate" players' rights, will adopt the most burdensome and anticompetitive restrictions possible. The owners simply have too great a financial interest in the question of signing collegiate players to expect them to adopt a rule that is fair to the players.

Moreover, the owners' antitrust exemption provided in S.610 is completely unnecessary to accomplish the bill's stated

goal of "encouraging" student athletes to complete their college education. League programs which truly only "encouraged" student athletes to get a degree would not violate any antitrust law or policy. Employee scholarships, programs reimbursing tuition expenses, and other educational benefits available in many industries, are simply nonexistent in the NBA and most other professional sports leagues. This is not because of any antitrust problem, but simply because the owners have refused to provide such benefits.

By contrast, the Players Association has participated in a number of programs designed to encourage NBA players and high school athletes alike to get a good education. No one knows better than the Players Association that a player's career is all too short and that his success in later life is likely to be far more dependent upon his education than upon his sports accomplishments. For this reason, the Players Association has participated in two separate programs designed to provide NBA players with the college and career counseling that they so badly need. Even more importantly, however, is the problem of high school athletes who drop out of school with visions of a professional sports career dancing in their heads. The Players Association is proud to be one of the co-sponsors of a group which visits high school students around the country to stress the importance of getting the best education possible. Programs like these, which are truly designed to "encourage" young athletes to complete their education, do not pose any antitrust problem. It has only been when the owners have tried to use the pretext of encouraging athletes to complete their education as an excuse to supress competition that the antitrust laws have quite properly come into play.

In sum, the Players Association opposes S.610 primarily because we believe that our own experience with college eligibility rules demonstrates the danger of giving league owners the authority to establish whatever rule best serves their own eco-

nomic interests. Application of the antitrust laws, as modified by collective bargaining where appropriate, provides the best means of developing fair rules in this area. Under this system, legitimate encouragement to student athletes to complete their education can be provided, the rights of players can be protected, and the needs of the colleges can be fulfilled, without granting sports team owners any new antitrust exemption.

Senator SPECTER. I would like to now call Steven Ehrhart, Esq., general counsel of the U.S. Football League. Mr. Ehrhart, we welcome you here to speak on behalf of the U.S. Football League. As we said earlier, we had hoped that Commissioner Simmons could have been with us. We hope to hear from him yet, but we do welcome you here.

Your full statement will be made part of the record, and you may proceed.

STATEMENT OF STEVEN E. EHRHART, COUNSEL TO THE COMMISSIONER AND DIRECTOR OF ADMINISTRATION, U.S. FOOTBALL LEAGUE

Mr. EHRHART. Thank you, Senator. And Mr. Simmons did authorize me to say that because of a longstanding commitment that he had prior to the invitation that—but he certainly would welcome a later appearance, as I think your staff had suggested.

However, I think I am particularly in a good position to be able to comment on this. My role with the league is not only counsel, but director of administration, and also secretary of the league.

But my background is having been a college coach and also after I finished my legal degree, I did serve as a sports lawyer and did represent a number of young men as they made their transition from the college ranks to professional football.

No. 1, I would just like to highlight a few things that have been said here. The league's position on the legal implications of the undergraduate signings. I think we took painstaking efforts to insure that our legal position was accurate. As you pointed out, we did review in detail the legal opinion that Mr. Manton had furnished to us. We had two outside, independent opinions, and also since that time——

Senator SPECTER. What were those outside opinions? Did they say unequivocally that the NFL rule was violative of the antitrust laws?

Mr. EHRHART. Yes, Senator Specter. As it is applied, it is across the board; it is either a black or white situation. There is no leeway in the rule, and I do have a copy of the rule here which is the same exact wording as the NFL has.

Senator SPECTER. Would you be willing or would you be comfortable in providing us with copies of those opinion letters? I do not press it at all. I only ask if you would be willing.

Mr. EHRHART. I could certainly—what I would do is have the law firms they were furnished to as in-house working papers—but I will have them deliver direct statements to your staff. I would have no problem with that.

Senator SPECTER. Well, if you would really feel comfortable in doing that, we would like to see them.

Mr. EHRHART. That is fine. We—because, quite frankly, since the signing, we have been contacted by numerous legal scholars—in fact, there is a group of law professors, I believe, in Michigan who have been preparing over the last 8 months a Law Review article on a hypothetical Herschel Walker versus the NFL. And they have done painstaking research to point out that he would win the case hands down.

And I think the reason that they all state this, Senator, is because of all the evidence that has been in the public domain in the last 3 years. Quite frankly, NFL coaches and talent scouts stating that this young man should be playing right now, so that the evidence that would have been elicited at any trial would have been clear.

In other words, there were statements from such noted people as Don Shula and Gil Brandt that, hey, this young man should—can play right now, and he is better than half the backs in the NFL at that point.

So, the type of evidence that would have been presented at any trial would have been unequivocal. We could not have presented any evidence to point out that this young man is not capable, either physically, mentally, or emotionally to play, when everybody had made those statements over the last 3 years.

And, in fact—and maybe I will digress here for a minute. When we had this meeting in Dallas—and I would like to clear that up. Evidently Coach McClendon was not able to attend that meeting, but Commissioner Simmons and I did appear at that meeting. And the coaches association was represented by Coach McClendon, their executive director, and two other coaches, Emery Bellard of Mississippi State and George McIntyre of Vanderbilt, and there were three conference commissioners there, the commissioners of the Big Eight, the Southwest Conference, and the PAC 10. And the statement that was referred to earlier in the earlier witnesses here, that was a joint statement entered into by those individuals and released to the press in Dallas.

So I am not quite certain of what the situation is now.

Senator SPECTER. And the import of that statement was what?

Mr. EHRHART. The import—what we did talk about, and I will skip to the back of my statement here, Senator; what the league's posture is in this matter is fairly clear. We want to obey the law, quite frankly. We do not want to get into a position where we deny the rights of a young man which can be proven clearly to us.

And I think in this situation, we are not going to duck the issue; we are going to face right up to it.

Senator SPECTER. Did you reach a truce with the coaches association?

Mr. EHRHART. What we discussed with them—and we went in a full day's conference with them. We pointed out the legal ramifications. They also had sought legal advice, and their advice agreed

with the advice that had been furnished to us. There are going to be situations where we cannot run away and hide from this issue. What we talked about was how can we coalesce our positions and work together on coming out with something that will be lawful, follow the rules, but also carve out the areas where, if this is a particular situation, where the case of a Willie Young comes up, how do we handle it?

We just cannot simply say no to a young man like that. So we all felt that by working together with the committee—and in fact, Wyles Hallick, who is the chairman of the NCAA college-pro liaison committee and outgoing commissioner of the PAC 10, agreed to chair a committee which would work toward the promulgation of some type of procedure which would protect the college situation.

Now, I have no disagreement with what Coach Paterno said this morning. In fact, I agree with him, that the coach himself is in the best position to make an evaluation of whether a young man is physically, emotionally, mentally, or from an experience point of view, ready to step into professional football.

Some of the suggestions——

Senator SPECTER. Do you have a copy of the statement you the released?

Mr. EHRHART. I may have it here. I will dig it out and furnish it to the staff. It was a joint statement released by those parties there.

Senator SPECTER. What did it say?

Mr. EHRHART. It basically said that pending the continuing efforts of a joint committee which would be chaired by Mr. Hallick, that we would continue to enforce the current rule, but that everybody realized——

Senator SPECTER. Which rule, the Walker rule or the pre-Walker rule?

Mr. EHRHART. The player eligibility rule that is in existence in the NFL and the USFL which flatly prohibits going forward with any signing.

Senator SPECTER. So you agreed to forgo further signings?

Mr. EHRHART. That is correct. We agreed——

Senator SPECTER. How could you do that if you felt that rule violated the antitrust laws?

Mr. EHRHART. Because there was an agreement that we would move forward with all due speed to work out a system that would be legal.

Senator SPECTER. Have you not just entered into a multiparty arrangement to violate the law?

Mr. EHRHART. I think that is a good point, and we were willing to take that risk, that we would move speedily ahead in some committee meetings within the next month to design a situation—I do not think there are any other young men out there right now that could have been in a position to take advantage of this year's season.

But we all realized that we had to move forward in a hurry on this. Some of the ideas that were kicked around at that meeting would involve the college coach at any determination of whether a young man is ready or not. It would involve a hearing process; in other words, the hypothetical might be that, say, some agent—and

we certainly share Coach Schembechler's and Coach Paterno's thoughts about eliminating the unscrupulous agent from the act.

Senator SPECTER. Mr. Ehrhart, has any college player approached the USFL and said, "I would like to negotiate a contract under the Herschel Walker precedent?"

Mr. EHRHART. That is why we want to move ahead quickly. We have been threatened with several law suits in the recent weeks.

Senator SPECTER. So the answer is yes, some players have come forward and indicated that they wanted to sign a contract with the USFL.

Mr. EHRHART. That is correct. We had a situation with another 24-year-old, and I think Mr. Auler is going to refer to that, who approached us and said that certainly he ought to have the opportunity; we discussed this with the coaches and they felt that, yes, in a situation like that we should have a procedure, whether it is a hearing process—in other words, if an agent comes to us, be he unscrupulous or a valid guy, we refer it back to the college coach.

In other words, we eliminate a problem, as Coach Schembechler was talking about, so that the coach does not have to follow his player around, but we refer it back to him. He meets and counsels with his player; then we get into some kind of a hearing process that the coach conducts. Another suggestion that we——

Senator SPECTER. Mr. Ehrhart, how can the USFL refuse to negotiate with a player who wants to talk to a USFL team, once the USFL has concluded that there is a legal obligation to do so?

Mr. EHRHART. Senator, that is exactly why we want to adopt a system that would be rational and reasonable and within the precepts of the law. In other words, I believe that if we were approached by an agent or a player, we have the right to determine whether he is ready to play football, and by establishing some rational guidelines and criteria, in that decision, the best individual who can put input into that criteria is the college coach himself.

Senator SPECTER. But does the league have the right to make that determination? Is that not a question that has to be decided in open negotiations between that player and a team?

Mr. EHRHART. I think that what we have the ability to do is to utilize statistics and criteria, as the coaches were pointing out, that these players may not be ready and it would be an experience level, just as my example, if you have to go to welding school to be able to handle the dangerous torch; that we have some type of procedure where his coach—in other words, if Coach Paterno counsels with his player and states, hey, this player does not have the ability, the mental maturity, or he needs further coaching and experience before he would have the opportunity to statistically make the league. As Mr. Grantham——

Senator SPECTER. Does not that attitude materially undercut the league's credibility in having signed Herschel Walker?

Mr. EHRHART. No; because, as I pointed out, the evidence was out there. You know, you could not refute the evidence that this young man had the ability to play. It was clear.

In fact, Coach McIntyre from Vanderbilt at that meeting said that to think back on it, he has been saying for 3 years that this guy ought to—he is in a class by himself. He should be playing pro

ball now. So, in fact, the coaches had been making those statements that made the record clear that we had no choice.

Senator SPECTER. Do not answer this question if you do not want to, but has no team in the USFL said to the USFL that it would like to negotiate with a specific player?

Mr. EHRHART. At this point in time?

Senator SPECTER. At any point in time.

Mr. EHRHART. No; no team——

Senator SPECTER. No USFL team has said, we would like to take advantage of Herschel Walker's precedent by talking to X?

Mr. EHRHART. No; I think, Senator, that we have our own—the reason I pointed this out to Coach Paterno at our meeting last week: You can believe our position at this point because it is in our best interest to make certain that college football continues at the level it is. And quite frankly that may be that the colleges are talking from a self-interest point of view and so are we.

Senator SPECTER. But, Mr. Ehrhart——

Mr. EHRHART. But usually our self-interests coincide.

Senator SPECTER. What you are really saying is that the Herschel Walker incident is a hit and run case. The USFL——

Mr. EHRHART. No, no——

Senator SPECTER. Wait a minute; I want to finish the question. The USFL hit, got a great player, established great ticket sales, established great credibility, and did so under the stated reason or perhaps the excuse that the antitrust laws compelled you to negotiate with Walker. Then, having completed the deal, you went back to the old system, the old farm system, without really being serious about the status of the law which entitled Walker to be signed.

Mr. EHRHART. Not true, Senator. That is exactly why we travelled to Dallas and we travelled last week to Atlanta, to meet with the coaches' people and devise a rule that would conform to the law and would have a hearing type of process that would actually recognize the law. And we are not going to run away and hide from this issue.

And so we have stated we will enforce this player eligibility rule pending the meetings out of which we hope will come something that we all feel will be appropriate under current, existing law.

Now, if the legislation does pass—and as I pointed out in my statement, we certainly favor and perceive the goal of Senate bill 610, and if we can accomplish that through legislation or through an agreement with the coaches or the universities themselves—an idea that we threw around there was that the colleges themselves should designate an institutional representative, maybe a law professor, maybe someone at the university who could counsel and advise the young men and be the buffer in between agents and the professional leagues.

So we are not running away and hiding from this issue. We want to bring it out of the closet instead of sweeping it under and say let's get after it. Let's design something that everybody can live with and go about the business of both college football and professional football.

I do not think we are antagonistic with the colleges at this point, but I think we have to balance the interests of those particularly exceptional young men. And when I say exceptional, I am referring

to the Willie Youngs or the people that have flunked out or do not have the academic ability or the financial ability to stay in college.

Senator SPECTER. Mr. Young just walked in, just in time for that accolade.

Mr. EHRHART. Oh, good. I have never met the young man, but I—but what I think we need to do is address the issues of those players—and there are a lot of them out there—that have been denied the right to play in college, whether it is for academic reasons or financial reasons or age reasons, and that we cannot also deny them the right to play professional football.

So if we have some type of an agreement with the colleges that would go through an orderly procedure that would involve the coaches—we certainly do not want to go around the coaches—that would involve the institutions and get into the criteria of when is an individual ready or not.

And I know Mr. Auler will comment about Mr. Young, but quite frankly, there, when he had initially signed with our league, we were trying to work with the NCAA at that time about a modification of the rule. This has been going on since back last fall.

But I think there needs to be some modifications which would make that rule legal, rather than having it be it all one side of the street.

Senator SPECTER. Well, Mr. Ehrhart, I must say that the notions which underlie S. 610, which would enable the USFL to proceed legally under the Herschel Walker case, is greatly undermined by subsequent arrangements, because what you are really saying is that you do not intend to abide by the Herschel Walker rule. I have a grave question as to the good faith of the USFL in signing Walker, saying that the law compelled you to sign him, when you have just turned the tables, and are now saying you are not going to follow that precedent.

Mr. EHRHART. I do not believe—maybe I am not articulating myself here. Coach Paterno even stated—and we have talked with him—that there are exceptions to this rule that need to be—whether they need to be codified through Senate 610 or through a compact or an agreement with the colleges. What I am saying is that we would live and pursue the goals of 610, but we have to find a way to address the Willie Young situations.

So, within the concept and the purview of rule 610, I think we need to adopt something that takes into account the exceptions, as Coach Paterno pointed out. So I think——

Senator SPECTER. But the USFL has concluded that the eligibility rule was illegal. That is why you had to sign Herschel Walker. Now that you've signed Herschel Walker, you go right back to the rule.

Mr. EHRHART. Well, that is correct, during the pendency of this time period as we address it. In other words, Senator, let me give you a suggestion. The player eligibility rule, which is basically a one paragraph—you know, it is very hard and fast.

We need to develop within that rule some alternatives; say, for example, if a player is 25 years old or a player has been in the service or if his coach recommends him—this is a player that is—there are cases of a situation of a player who has flunked out of

three different schools. He cannot play in college, but under this current rule, we have to bar him too.

So what I am saying is I think we are on the same page, and maybe it is my fault for not articulating properly—is that if we can modify this hard and fast player eligibility rule, we will certainly enforce that.

But I think we have to have some mechanisms in there that will allow those kinds of players to come in. Now, the Hunter case, which was referred to earlier, that was outside the scope of the NFL player eligibility rule, but everybody just swept it under the carpet.

So, in other words, the NFL did not enforce that situation with Hunter, but he did not—he was, quite frankly, thrown out of school. And so that is the reason why nobody made a big deal about it. So what we are trying to do is bring it out on the table and let us get together with the coaches and let us recognize it.

But we will enforce a legitimate player eligibility rule. So, we do not disagree with the concepts and the goals of 610. What I am saying is that we simply have to modify our own player eligibility rule to allow the players, like Mr. Young, to be able to market his wares and pursue an occupation.

Senator SPECTER. OK; thank you very much, Mr. Ehrhart.

[The prepared statement of Mr. Ehrhart follows:]

Prepared Statement of Steven E. Ehrhart

Mr. Chairman: On behalf of the United States Football League and its member clubs, I thank you for inviting us to present the views of the USFL with respect to S. 610.

I feel I am in a particularly good position to make comment on this bill and the situation which the bill addresses as I have been a college football coach and a sports lawyer representing college football players making the transition into professional football.

I would like to clarify the league's position on the legal implications of undergraduate signings and to outline the legal principles which operate to limit the USFL's discretion and authority to control the situation. This specific issue has been fueled by the signing of Herschel Walker to a professional contract prior to the completion of his undergraduate studies. It is important to observe at this point that the majority of all professional football players have in fact signed professional football contracts prior to the completion of their undergraduate studies. Quite frankly, the Herschel Walker situation as it relates to academic progress is the rule rather than the exception. There is a vast difference between the definition of "remaining football eligibility" and academic progress. When the USFL was faced with the potential challenge to a self-promulgated rule that unilaterally prohibits the right of a young man to seek a professional football contract prior to the expiration of his "remaining football eligibility", the league necessarily looked to current established legal precedent.

The basic policy of the federal antitrust laws is to prohibit improper restraints upon economic competition and opportunity. Although professional sports associations have been allowed a large degree of self-regulation and broad powers to determine an individual's access to the rewards of commercial

sports activity, the judicial application of the Sherman Act to a variety of league activities has served to limit league discretion and authority to determine the initial eligibility of participants.

As a guide to our analysis of whether the current league rule would withstand an antitrust challenge, we looked to the precedents established in Haywood v. the National Basketball Association, 401 U.S. 1204 (1972) and to Linseman v. World Hockey Association, 439F Supp. 1315 (D.Conn 1977). Both cases involved the eligibility rules promulgated by the respective professional basketball and hockey leagues. In both cases, the rules restricting the economic opportunity of young athletes were found to be in violation of the Sherman Act despite the recognized special needs of league sports associations in the field of self-regulation and competitive structure.

Most specificially, the court in Haywood stated that although encouraging college athletes to complete their studies was a "commendable" goal, it was not justification for denying employment and economic opportunities to young athletes, particularly when an athlete's career is very limited and many athletes either do not have the motivation or the financial or academic capability to complete college.

The consideration given the bill must include a balance of the equities between the desires of the colleges to retain athletes for four years of "football eligibility" versus an individual's right to pursue economic and employment opportunities. The USFL certainly respects the value of a college education and it is in the best interest of professional football to maintain a strong college football program. However, under current law it is impossible to ignore a young athlete's right to pursue employment and career opportunities just as any other individual enjoys the same right.

The USFL encourages its players to complete their degree program by awarding substantial additional compensation to a

player obtaining his undergraduate degree. Currently, the USFL is the only professional league that has a specific contractual commitment to encourage degree completion by their athletes. The USFL player contract mandates that each player who executes a contract at a time when he is a student will receive monetary reward for completing his college degree.

The league would urge that an appropriate balance be reached between the desire of the colleges versus the obvious rights of the individual student athlete. The eligibility rules currently in existence in both the USFL and the NFL are rules designed to restrict the individual student athlete's rights until such time as their eligibility has been exhausted. The encouragement required to accomplish the desired goal of athletes completing their education must come from a joint effort and cooperation of the NCAA, the American Football Coaches Association, and both professional football leagues and should not come at the expense of individual rights and opportunities.

The league is in favor of what we perceive to be the goal of Senate Bill 610. However, we are unsure that the bill as written would accomplish the necessary goals. The USFL has offered possible alternatives to the NCAA, the CFA and the AFCA in attempts to insure that the best interest of the student athlete is protected without sacrificing that athlete's right or his educational opportunity.

Senator SPECTER. I will now call the next panel: Mr. Robert Auler, Mr. Willie Young, and Mr. Robert Ruxin.

Let us take just a 2- minute break.

[Brief recess.]

Senator SPECTER. There is a vote on right now, so I think it would be most expeditious if I went to the floor and voted. That is something I have to do above everything else. I regret the interruption. I shall return in about 10 minutes, just as soon as I can.

[Brief recess.]

Senator SPECTER. I regret the interruption, but when the bells ring and the votes are on, that takes precedence over everything else.

And you may be interested to know that when I departed it appeared that the Senate was adopting an amendment to the social security law which will make it easier for small businesses to remit withholding tax; somewhat removed from the current issue, but that is what we are up to on the Senate floor at the moment.

Well, our next witnesses, who are already present, are Mr. Willie Young, professional football player with the Canadian Football League, who has had his own experience with the NFL rule; Mr. Robert Auler, attorney, who represents Mr. Young; and, Mr. Robert Ruxin, author of "An Athlete's Guide to Agents".

Welcome, gentlemen. I believe we will start with Mr. Auler.

STATEMENTS OF ROBERT I. AULER, ATTORNEY AND PROFESSIONAL SPORTS AGENT; WILLIE YOUNG, PROFESSIONAL FOOTBALL PLAYER, CANADIAN FOOTBALL LEAGUE; AND, ROBERT H. RUXIN, ATTORNEY AND AUTHOR, "AN ATHLETE'S GUIDE TO AGENTS"

Mr. AULER. Mr. Chairman, I would like to preface my remarks by saying that I agree with practically everything which Coach Paterno had to say, substantively. I suppose as a sports lawyer, I am supposed to differ with the interests that he has brought to the floor, but I think he has been a very thoughtful witness for you. And most of the things that he says are very, very important substantively.

Our position with respect to Willie Young has to be clarified just a little bit, and I am going to depart from all these written remarks and shorten it quite a bit.

Mr. Young is 27 years old. He has five children to support, and he cannot take up the occupation for which God obviously intended him.

If you look at Mr. Young, you see a professional football player. He is the model for what a professional lineman should look like. He is 6'7"; he is 280 pounds, and he is hostile, agile, and mobile, as the man from Arkansas said. He is now prohibited from playing in his country, the United States, until he reaches the age of 30, because through a number of educational misfortunes and a poverty background, he did not commence his college education until the age of 26.

He was serving in the U.S. Army. He was driving a Lincoln and decided that perhaps the best thing for him and his family would be to give the possibility of professional ball a try; go to college for

some period of time; get the excellent coaching, which an institution like the University of Illinois under Mike White, could provide him and then take up the profession that he was intended all along to have by the way he is built and the way he is.

Now, if your bill passes, our message to you is that the extraordinary person like Willie Young should be protected from the unfortunate way in which the system now operates. And that is, until Mr. Young's college class graduates, he cannot play ball in the United States under the NFL and, as we understand it, the USFL rules.

Now, that is fine for a young man just out of high school, a young man of 17 or 18 years of age, 19, 20, perhaps 21, 22. But if a person reaches 23 and has not exhausted his college eligibility for whatever reason—going into the Army—God forbid we have another war. But in 1946 there were a great many people who came back from the Army and had to fit back into these colleges at somewhat advanced ages. And many of them went on to have fine professional careers in those important pro teams we remember in the early fifties.

Senator SPECTER. Why is Mr. Young precluded from playing in the National Football League or the United States Football League until he is 30 years of age?

Mr. AULER. The no tampering rule measures its inception from the beginning of his college class; not from his high school graduating class; but from the day that he starts into college.

Senator SPECTER. And when did he start college?

Mr. AULER. At the age of 26, with five children and an Army background.

Now, with respect to this, our main focus is on the unfairness of this rule——

Senator SPECTER. Have you tried to alter that situation since the Walker incident?

Mr. AULER. Senator, we have been invited by people in this room today to consider antitrust action against one or more professional leagues, but we think that is a very poor way to interview for a job.

A man like Mr. Young, who has come from nothing to something, and is still not the best football player in the country at his position—I know he will disagree with me. But perhaps that is what the pro scouts might feel. That is a very, very poor way to interview for a job with the USFL or any outfit is to start off threatening to sue them.

Now, we do not want to do that. We want Willie Young to come in through the front door. We want him to come in with dignity. That is why he is in Canada.

Senator SPECTER. Well, I understand he had a contract with the Chicago Blitz.

Mr. AULER. He did.

Senator SPECTER. And that it was nullified.

Mr. AULER. It was initially nullified, and then there was 2 months of discussion in which we were all in pergatory. We did not know if it was null or whether it was not null. As it turned out, we all agreed that it was in the best interests of everyone, particularly Willie and his family, to commence immediate employment in

Canada, rather than wait for several months, at which time his USFL contract——

Senator SPECTER. Is Willie still interested in playing for the Blitz?

Mr. AULER. Well, Willie is interested in playing right now and honoring his obligation in Canada. That is true, is it not, Willie?

Mr. YOUNG. Right, right.

Mr. AULER. And those folks have been first class with us. The Winnipeg people were absolutely superb. When Willie needed employment, they found a way to get the job done and get some money into his family's mouths.

So we feel a moral obligation to them and we certainly have a contractual obligation.

CHRONOLOGY OF WILLIE YOUNG

Senator SPECTER. What was the chronology?

Mr. AULER. Willie had a bad week coupled with a bad year, financially, in terms of the growing debt that was accumulating to landlords and other people. And just before the commencement of the season——

Senator SPECTER. Mr. Auler, let us start with the chronology.

Mr. AULER. All right.

Senator SPECTER. Willie Young played for the University of Southern Illinois?

Mr. AULER. No; University of Illinois.

Senator SPECTER. University of Illinois in 1981?

Mr. AULER. That is right.

Senator SPECTER. And he was a freshman at that time, and he was designated the outstanding football player on the team?

Mr. AULER. Outstanding defense lineman.

Senator SPECTER. Outstanding defensive lineman. And then for financial reasons, he decided he had to turn pro.

Mr. AULER. He hung in there. And that is the best way to term it—for the balance of the year up to the 1982 season.

And in August of 1982, Willie, frankly, had come to the end of the line. He was deeply in debt, and I thank the committee for graciously supplying Willie with the wherewithall to be here today; I know there are probably some of his creditors sitting here watching how he could afford to be here and not be paying them. But I want to make that point clear, that Willie is still deeply in debt.

Senator SPECTER. Did Willie seek to play with the NFL?

Mr. AULER. He wanted to play with whomever he could play with. The Blitz was the first on the scene.

Now, you made a point earlier concerning legal representation. Willie did not seek the services of an agent or a lawyer before he made his decision. And that is the kind of a mess that eventuates when these people cannot have professional help.

Senator SPECTER. Why did you not seek a lawyer, Willie? Did you feel yourself bound by the NCAA rule?

Mr. YOUNG. No; well, when I first decided not—you know— that I could not afford to play college football anymore, it was a thing where I—you know, one morning I woke up. I talked to Bruce Allen on the telephone, and—well, one night I talked to him.

Senator SPECTER. Bruce Allen or George Allen?

Mr. YOUNG. Bruce, the son, right. And he said—he asked me did I want to meet, you know. We set up a meeting for the next morning at 9 o'clock.

So, he came. He drove down from Chicago, and we met. And I signed this contract, just, you know——

Senator SPECTER. When did that occur, Willie?

Mr. YOUNG. About 3 days after I decided that I could not afford to go to play college football.

Senator SPECTER. In August 1982?

Mr. YOUNG. Right.

Mr. AULER. That is right.

BLITZ CONTRACT VOIDED

Senator SPECTER. So, you signed the contract?

Mr. YOUNG. Right.

Senator SPECTER. And then what happened?

Mr. YOUNG. And then the next day—the next evening, I was reading the newspaper, the sports page, and I see these big headlines, Willie Young contract with the Chicago Blitz voided.

Mr. AULER. That is right.

Mr. YOUNG. And, so I——

Senator SPECTER. Who voided the contract?

Mr. YOUNG. The commissioner, I guess.

Mr. AULER. Commissioner Simmons initially gave out a release to the effect that the contract would be voided.

Senator SPECTER. He voided the contract because of the league rule against signing players with college eligibility remaining?

Mr. YOUNG. Right.

Senator SPECTER. And then what happened after Herschel Walker was signed?

Mr. YOUNG. After Herschel Walker was signed, I was up in Canada. I went to Canada in October. And after Herschel signed, I mean, I just—I did not know what was happening, so I called my lawyer.

Senator SPECTER. How did you feel about the situation when you found out that Herschel Walker could be signed but you could not be?

Mr. YOUNG. Well, I think Herschel is a great football player, and I could see why a lot of people would want him, but still——

Senator SPECTER. How about Willie Young?

Mr. YOUNG. Well, I know I am a great football player. [Laughter.]

But——

Senator SPECTER. Well, how did you feel when they let Herschel Walker sign, but would not let you sign?

Mr. YOUNG. Well, I felt let down because I have five kids. I mean, you know, and plus I am 27. I am just trying to make a living, you know. I am not out here—I am not trying to get rich. I just want to make a living. I want to be happy. And playing football makes me happy.

Senator SPECTER. Are you signed up to play in the Canadian League beyond this year?

Mr. YOUNG. Yes.

Senator SPECTER. How many years are you signed up for?

Mr. YOUNG. Two.

Mr. AULER. We signed for 2 because the initial situation last fall, not only were those folks first class with us and gave him immediate employment, rather than holding off for tryout camp; they let him come to Canada and make money right now; we felt a moral obligation to do what they wanted.

Moreover, the situation was apparently going to be very hard and fast, and it was sue somebody or sign in Canada. Now, at the end of 2 years, we are going to want to talk to somebody in the United States about Willie because by then he is going to be a star up there.

Senator SPECTER. Have you sought to negotiate again with the Blitz after the 2 years are up?

Mr. AULER. I would say that the Blitz handled this with a great deal of dignity and interest in Willie's family as well. And Dr. Dietrich, in particular, was a true sportsman in that sense. The ultimate decision to allow Willie to go to Canada and drop all contractual claims was based upon really Willie's five children more than anything else.

Dr. Dietrich showed a great deal of class in that respect.

Senator SPECTER. How does Dr. Dietrich figure into this?

Mr. AULER. He is part owner of the Blitz, along with George Allen, and I think another man.

Senator SPECTER. Well, what choice did they have at that time? Were they doing Willie a favor in letting him out of the contract? They were not able to play him, were they?

Mr. AULER. They wanted Willie as a football player, but they also did not want the squabble which had ensued with Coach Schembechler and others who were upset about the raiding, as they termed it, of an undergraduate.

Senator SPECTER. But was there anything left for the Chicago Blitz to do after the league had invalidated the contract? Was that not conclusive?

Mr. AULER. Senator, there was a great deal of whether the cement is going to set or not involved in whether the thing was invalid. It was not finally invalid until all three entities decided that it was. There were contentions that it was valid and there were contentions that it was invalid.

Senator SPECTER. So, there was a point where the Blitz might have challenged the league determination?

Mr. AULER. He was a little bit pregnant for about 3 months there, and that was the problem in making a determination: was he or was he not.

Now, with respect to——

Senator SPECTER. So then everybody decided that the contract would be null and void. They really rescinded the contract, didn't they?

Mr. AULER. That is correct.

Senator SPECTER. Rescinded it as between Willie and the Blitz, and Willie went on to the Canadian League where he is obligated to play for 2 years, and after 2 years he would like to come back to the United States and be able to pl y.

Mr. AULER. That is correct.

Senator SPECTER. And your answer is a rule which would be tailor made to Willie Young, a rule which would eliminate the prohibition at the age of 23.

Mr. AULER. Senator, living on a college campus, as I have for over 20 years, I have watched students get into pickles where they have to drop out of school for family trouble, for finances, health, breaking a leg, mental breakdowns, whatever.

And these students come back and pick up their college athletic careers many times. But why should it be that the colleges have protection beyond the age of 23 when all rules——

Senator SPECTER. How about lower than 23, Mr. Auler? Do you think that the rule makes sense younger than 23?

Mr. AULER. I would say 5 years from the graduation from the student's high school class, because that is the 5-year measure that they use.

Senator SPECTER. So you do not really quarrel with the rule?

Mr. AULER. We do not quarrel with the rule.

Senator SPECTER. You only object to the rule when it is applied to someone who is somewhat older, someone like Willie Young?

Mr. AULER. We feel that there are great inequities in forcing these students to remain penurious. They are forced into poverty. Do you have any idea what the NCAA scholarship really translates to in dollars?

Senator SPECTER. What does it translate to, Willie?

Mr. YOUNG. Pardon me?

SCHOLARSHIP MONEY

Senator SPECTER. What does the scholarship amount to in actual dollars?

Mr. YOUNG. Not very much. I made $290, maybe $270 a month. And they told me I could not get no job; otherwise I would put the university on probation.

Mr. AULER. That is right.

Mr. YOUNG. And the year I went there—the year before that, they already was on probation.

Senator SPECTER. You cannot get a job, outside employment, without placing the university on probation?

Mr. YOUNG. Right, if you are on scholarship.

Mr. AULER. The rules require that during the school year you may not work except in vacation periods.

Mr. YOUNG. Right.

Mr. AULER. And how in the world are you going to get a job in the economy for a fellow like Willie during a vacation period?

Senator SPECTER. Willie, aside from the rule as it applied to you and the exception which your attorney has suggested, that it should not apply after the age of 23, do you think that there ought to be a rule at all? Should Herschel Walker have been barred from signing with a professional team before he finished his college eligibility?

Mr. YOUNG. No; well, if like you got the ability to play pro football—and OK, 5 years after your graduating class from high school, I feel that is long enough.

Senator SPECTER. Well, how about before that? Herschel Walker signed before his college eligibility was up, sooner than 5 years after his class graduated from high school. Do you think that was proper?

Mr. YOUNG. No.

Senator SPECTER. Do you think Herschel should have finished college? Do you think Herschel made a mistake?

Mr. YOUNG. No; I cannot say that Herschel made a mistake. Only Herschel knows whether he made a mistake or not.

Senator SPECTER. It is a tempting offer at $2.5 milion.

Mr. YOUNG. Well, at $2.5 million, I would have signed from high school. [Laughter.]

Mr. AULER. Senator, to emphasize one point; if these folks had some walking around money in their pockets to go to a movie once in awhile, that would keep the college athlete, the marginal athlete happy. I believe that, don't you, Willie?

Mr. YOUNG. Oh, yes.

Mr. AULER. There is no money whatsoever beyond room and board, tuition, books, allocated under the NCAA scholarship. It should be analogized to a fellowship. The colleges are used to giving fellowships which have a little bit of living money involved in them, but they will not do this with the scholarships.

They will spend $100,000 to recruit a 7-foot basketball player, and then under the rules they are not entitled to give the man $10 a month to go to the movies and take a girl out on a date.

And that just encourages the phoney situation that we have now with under the table payments and agents running out prepaying these people to sign up with them prematurely and hypocrisy to the *n*th degree, which is really what the situation is.

Senator SPECTER. I would like to turn now to Mr. Robert Ruxin, who is the author of "An Athlete's Guide to Agents," a book published by the Indiana University Press earlier this month.

Mr. Ruxin is an honors graduate of Princeton and Harvard Law School and practices communications and sports law. He has worked with the Collegiate Commissioners Association and the NCAA professional sports liaison committee to produce a pamphlet which advises athletes when and how to hire a competent agent.

Your full statement will be included in the record, Mr. Ruxin. And we would appreciate it if at this time you would summarize.

Mr. RUXIN. Thank you, Senator. I commend Senator Specter for drawing attention to a serious problem for college athletes: How to cope with the pressure of preparing for a potential career in pro sports. This is especially difficult for undergraduates, as we have heard.

Consider the situation in which a Ralph Sampson or Pat Ewing finds himself after his sophomore or junior year. He has to choose between placing his name in the NBA draft list or staying in school.

At stake for him is a multimillion dollar contract and his college degree. At stake for the agent who becomes his representative, if he chooses to go pro, is 5 to 10 percent of that contract.

At stake for the college coach may be the chance to make the final four or a losing season or maybe even his job. At stake for the university are hundreds of thousands of dollars from TV revenue.

At stake for the NBA team that would like to draft him may be a division title or even solvency.

In sum, when looking at a multimillion dollar decision, where can this student turn for help? Where can he go without violating NCAA rules?

He can talk to agents, but he cannot agree to retain one. He can hire a lawyer, but only if he can pay normal fees, and the lawyer does not negotiate for a pro contract. He can talk to his coach, but as Coach Paterno suggested, the coach may be leery of the NCAA rules.[1]

THE AGENT PROBLEM

Senator SPECTER. Mr. Ruxin, it has been suggested that agents are at the heart of the problem. This is a question which Senator Leahy has asked that I ask you. We are running very short on time. What qualifications are required to represent a college athlete, a Harvard Law School degree?

Mr. RUXIN. At this point, there is only one qualification. That is that you have a client.

Senator SPECTER. Does anyone regulate agents?

Mr. RUXIN. Not really. A couple of groups such as the NFL Players Association are trying to regulate agents. The State of California has a new law that requires non-attorney agents to register, pay a fee, and post a bond.[2]

Senator SPECTER. Can an outstanding undergraduate athlete, such as Pat Ewing or Ralph Sampson, obtain an insurance policy to protect against an injury that might reduce his professional value or even end his career?

Mr. RUXIN. He can if he can figure out a way around the NCAA rules about special benefits to athletes.

Senator SPECTER. If he can pay the premium himself, you mean?

Mr. RUXIN. Right.

Senator SPECTER. What changes should the NCAA make to preserve an athlete's eligibility until he actually signs a legally binding professional contract?

Mr. RUXIN. Well, I would support what Coach Paterno suggested today, that the NCAA legalize agents under certain specified conditions and bring the problem out of the closet. I would think that would be the most constructive approach.[3]

Senator SPECTER. Do you have a comment to make about the extensive discussion we have had about unscrupulous agents?

You have a brief period of time to defend the profession.

Mr. RUXIN. I would say that most athletes are represented by qualified agents. The problem is that there are hundreds of people running around trying to get one or two clients, particularly college students, and many of those are the unscrupulous or unqualified agents.

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[1] See "Unsportsmanlike Conduct: The Student-Athlete, the NCAA and Agents" 8 Journal of College and University Law 347, Robert H. Ruxin, (1981-82).

[2] See "An Athlete's Guide to Agents," Robert H. Ruxin, Indiana Univeristy Press, 1983, at 148.

[3] For a description of the NCAA rules relating to agents, see "A Career in Professional Sports: Guidelines that Make Dollars and Sense," Robert H. Ruxin, Published by Collegiate Commissioners Association, 1982.

Senator SPECTER. Well, gentlemen, thank you very much. Mr. Young, do you have anything to add? You have come a long way. We appreciate your being here. It obviously emphasizes the scope of a problem when a man of your stature describes his difficulties. And the effort is being made to see that someone in your situation and every situation is fairly treated.

Let me just ask you one followup question: What was your feeling as to the sincerity of the university in structuring a program in which young men like you could actually graduate?

Mr. YOUNG. Well, that all depends on what, you know—unless you—if I was not in football, then I could say so. But I was—I went to school for one reason. I mean, I wanted to go to school just to get the experience of playing college football so I could try my chances in the pros.

Senator SPECTER. The purpose for the rules limiting professional teams from talking to or signing up college players is stated to be that the student should have an opportunity to finish school.

Mr. YOUNG. Right.

Senator SPECTER. Is that really the point of the rule, in your opinion?

Mr. YOUNG. Well, not really. To me the rule is to keep college players in college.

Senator SPECTER. Do you think that college players are unfairly treated by the current rules which keep them in school to build up gate receipts for the colleges?

Mr. YOUNG. Oh, yes. I mean, this is America. Everything is supposed to be free here. So I do not think they should have a rule telling you that you cannot talk to an agent, that you cannot do nothing until you do this or do that.

Senator SPECTER. Are things working out reasonably well for you now in the Canadian League?

Mr. YOUNG. Oh, yes.

Senator SPECTER. Do you like it there?

Mr. YOUNG. Oh, yes. I am going to have a great year.

Senator SPECTER. Are you still the outstanding defensive lineman around?

Mr. YOUNG. I think so.

Senator SPECTER. Very good. Thank you. Thank you very much.

Mr. AULER. Thank you, Senator.

Prepared Statement of Robert I. Auler

The first shot in the war between the colleges and the pros was fired in the Coed Theatre in Champaign, Illinois when a would-be agent who managed the theatre slid into the seat behind a Junior at the University of Illinois and talked him into turning pro before the movie ended. The athlete was Red Grange. The year was 1927.

Two more U of I sportsmen, George Halas and Coach Bob Zuppke, negotiated the truce which lasted until another U of I football player, Willie Young, was signed by the Chicago Blitz after despairing of the impossibility of living within the NCAA concept of amateurism.

Willie, unlike Red Grange and Herschel Walker, was married and had five (5) children to support. He was a former army sergeant and was 27 years old at the time. He had left a secure position with the U.S. Army not from an undying thirst for book learning, but from a recognition that Army football showed that his 6 foot 7, 280 pound body could earn him and his family a good living, assuming it could be trained to perform at a professional level.

Willie accepted the 1980 version of the American Dream.

He agreed to sacrifice his income, his job security, and his family's comfort to attempt to live within a code of amateurism and at an economic level which would be difficult for a 17 year old with no responsibilities.

After a year or so of trying he found that it was impossible. He had gone from driving a Lincoln to a used 10 speed bike. He owed his landlord, and lots of other people who didn't understand that Willie couldn't go out and get a part-time job to pay them without violating NCAA rules.

With more practical family problems than a good soap opera, Willie discussed his options with his wife and with his coaches. Reluctantly he decided to leave school and the restrictions of being a gentleman athlete.

Immediately he was signed to a contract with the Chicago Blitz. Almost as quickly the contract was reported to have been nullified by the league office.

Willie belatedly sought legal advice, which he should have been able to seek before making his decision, but which he could not have secured without having breached NCAA rules by securing an agent. The most important decision of his life had to be made in a virtual vacuum.

There ensued several months of negotiations which terminated in a humanitarian decision by Blitz owners Dr. Ted Deitrich, George Allen, and the USFL that Willie's interests and their own would be best served by allowing him to feed his family by taking immediate employment with the Winnepeg Blue Bombers.

Willie Young's problem under the current no tampering rule of both the NFL and and the USFL amounts to this: since he entered college at 26, he must now wait until must wait until his college class graduates before he can play professional football in the United States. That means that at the age of 30 when most professional careers are over or close to it, Willie Young could seek employment in the profession for which God intended him. For people like Willie who have not only missed the first bus, but several more, this is to deny the reality of the American dream.

We do not quarrel with the principle of protecting the colleges from raiding by the pros. In fact you should make it an offense for professional agents to contact normal undergraduates and encourage them prematurely to forfeit their future amateurism by hiring those agents and thus turning pro.

The colleges need protection in order for the informal system of professional sports education (and that is what it is) to continue.

Nevertheless, there is no reason why the protection given to the colleges should not terminate at some fixed age, whether it be 23 or 24 at which time a late-bloomer like Willie Young, could elect to

become a professional. The age of 23 would be 5 years from the normal high school graduation date, which is the figure the NCAA and most major conferences have now fixed as the normal progress time toward a degree. If for whatever reason, be it military service, having to drop out for health, family, or other reasons, an individual has not achieved an exhaustion of his eligibility by the age of 23 or 24 he should have the right to try to earn a living as a professional. Surely this would not be a hardship to the colleges. Individuals meeting this description are few and far between.

However, along with protecting the colleges and the professional leagues, both of which would profit from the continued informal minor league system, you must also protect the college athletes themselves if you are taking away their option of turning pro.

The NCAA scholarship provides room, board, tuition, books, and no walking around money. It is medieval. It it so unrealistic that it is apparently honored in its breach. It is the only thing which hasn't felt the effects of inflation in 20 years. Everyone who is around college athletics knows that illegal inducements are far from exceptional, and that the meager enforcement staff of the NCAA simply cannot keep pace with a chronic failure to obey the strict amateur financial standards imposed by the NCAA.

Even the AAU and various international bodies have now recognized that amateurs may have to eat, clothe and house families, and perhaps even go to a movie once in a while. They permit these "amateurs" to work for firms which are connected with the sports in which they compete.

The monkish ideal of amateurism inherent in the current NCAA scholarship is totally unrealistic and encourages the current informal system of illegal payments, illegal inducements from agents to agree to premature and secret pacts, and results in enforcing poverty upon an individual in order to perfect his physical talents to the point where he can earn a living with them.

Colleges and universities grant scholarships to bright students, but they also grant fellowships to people who wish to make a profession out of academia. The analogy should be carried over to athletics. An undergraduate living at the subsistence levels of most scholarships can improve his financial lot considerably by working during the school year. An athlete cannot according to NCAA rules. The same student, if he is asked to devote himself exclusively to an intense academic program such as graduate school, finds that his needs have been taken into account when he receives a fellowship; in setting the level of the fellowship the University assumes that the student is going to have to live his life in the material world as well as in a laboratory or classroom. If the college athletes are given a realistic stipend, they will have less to complain about in terms of being prohibited from prematurely turning Pro. Giving the jocks a raise should be part of a negotiated settlement of this current controversy. It is ludicrous to see tens to hundreds of thousands of dollars being spent to recruit a 7 foot basketball player or a 9.2 halfback, who, then, can't receive any legitimate spending money. Tell me they are going to obey such a rule! Many of these stellar performers are from economically deprived circumstances where they can't write home to Dad or Mom and expect to receive what most college students get once a month, a check from home.

We are here only to ask for an end to the hypocrisy which is currently written into the rules if they are to continue to shield both the colleges and the professional leagues from serious antitrust questions. The rules prohibit college athletes from engaging attorneys to espouse their position. No one is suggesting that college athletes should band together like other groups, and negotiate these points. It is for you as Senators, however, to recognize that they are the pawns in this system. They produce millions for the colleges and the pros while risking their future health and future careers during every minute of their performances. They are subject to being cut, benched,

and are currently without any organized political action committee.

Is it unreasonable to permit them to seek a living after age 23? Is it unreasonable to extract from the NCAA and the colleges not a living wage, but something to spend on themselves? The athletic system in this country is a good one and a desirable one, but it encourages the choice between cheating and turning pro.

All we ask is that you limit athletic serfdom to 5 years after high school and provide humane rules and living standards for the serfs.

Had this been done, there never would have been a Willie Young problem, and maybe other better-known athletes would be content to finish their college eligibility.

Prepared Statement of Robert H. Ruxin

Mr. Cnairman:

I am Robert H. Ruxin of the law firm of Preston, Thorgrimson, Ellis & Holman in Washington, D.C. I am the author of An Athlete's Guide to Agents which advises college and professional athletes on how to deal with sports agents. I am also the author of a pamphlet for college athletes about when and how to retain qualified agents and other professional assistance. This pamphlet was published by the Collegiate Commissioner's Association through a grant from the NCAA.

I commend Senator Specter for drawing attention to a serious problem for college athletes--how to cope with the pressure of preparing for a potential career in professional sports. This pressure manifests itself particularly in the solicitation of these athletes by sports agents. It is not unusual for an All-American football or basketball player to be contacted by several hundred would-be agents.

It is very difficult for the student athlete to pick a competent agent from among those who are less qualified and, unfortunately, sometimes unscrupulous. For example, some agents hire front men to contact college athletes. These "bird-dogs" offer an "inducement" to make the athletes' senior year much more comfortable. The Boston Globe reported that last year the going rate for football players was a $15,000 "signing bonus," and a car, and a $7,500 wrist watch. After the player signs a professional contract, the agent generally takes back the $15,000 bonus, and the funds for the car, and his fee (sometimes as much as 10%), and his expenses.

The situation is even more difficult for undergraduates who face a choice between completing their education (or at least their eligibility) and seeking a lucrative professional contract. I have attached to my statement a chapter from An Athlete's Guide to Agents, which addresses this special problem. This is the

same problem which, I believe, is at the heart of Senator Specter's concern in introducing this legislation.

One way to ease the pressures a talented undergraduate athlete faces is to inform and educate him about the business of professional sports as it affects the athletes. It is unlikely that many athletes will chose to leave school, if they are given the relevant information about the pros and cons of leaving college early for a professional contract and the opportunity to consult trustworthy advisers--both within and outside the athlete's university. Undoubtedly, in certain limited circumstances, in football as has been true in basketball and baseball, the wisest decision for a particular athlete will be to seek a professional contract.

College athletic officials have begun to recognize that an obligation exists to help their athletes make a smooth transition to professional sports. I would suggest that this Committee recognize and encourage this effort to address the fundamental tension between amateurism and realism that affects the career choices of the student athlete. The goal should be to increase the student athlete's ability to make informed decisions. A cooperative effort on the part of the colleges, the professional leagues, and the players' associations to educate and inform student-athletes about the business of professional sports should alleviate the need to enact legislation as this time.

NCAA rules should be modified to permit college athletes to make informed, reasoned decisions on whether to sign a professional sports contract. The present rules permit neither to the detriment of the athlete and the university.

Why, for example, declare ineligible an athlete who signs a non-binding contract (such as reportedly was the case with Herschel Walker)? Why does a basketball player lose his eligibility merely by declaring his intent to be selected in the NBA draft even if he subsequently withdraws his request or is not drafted or does not sign a professional contract? More funda-

mentally, why not allow undergraduates to retain agents, albeit with certain prerequisites, such as filing a copy of any agreement between the athlete and the agent and barring any compensation from the agent to the athlete?

I would be pleased to answer any questions. Thank you for the opportunity to appear.

RHR:lc

Attachment

EXCERPT FROM R. H. RUXIN, "AN ATHLETE'S GUIDE TO AGENTS," INDIANA UNIVERSITY PRESS (1983)

Question 9: What if I'm thinking about turning pro early?

Questions about retaining an agent pose special problems for student-athletes who consider turning professional before their class graduates. Ralph Sampson reportedly rejected $3.8 million over six years from the NBA after his sophomore year at Virginia, and he turned down the prospect of an even better contract after his junior year. Isiah Thomas, Mark Aguirre, Magic Johnson, and James Worthy chose to leave school early for pro basketball. Herschel Walker seriously considered signing with the Canadian Football League after nearly winning the Heisman Trophy as a freshman. He considered trying to play in the NFL, after his sophomore year, but decided to stay at Georgia at least one more year. While most of the attention has focused on undergraduate basketball players deciding whether to turn pro early, if Walker or another outstanding underclassman decides to sign a professional football contract before his class graduates, a situation similar to that in basketball could quickly develop for college football players. The United States Football League stated that it would not sign underclassmen for its initial season in 1983. But either competition between the NFL and the USFL or a suit by an underclassman could change the situation.

If professional football teams start signing undergraduates, college players will need to be wary of agents who push them to sign early without thoroughly evaluating the pros and cons of that decision. Basketball players have faced the same decision since Spencer Haywood went to court in 1971 to force the NBA to sign undergraduates.

Consider the case of Yommi Sangodeyi, a 6 foot 10 inch 248 pound reserve center for Sam Houston State. After Sangodeyi's sophomore year, an adviser convinced him to sign a letter to the NBA asking to be drafted in the June 1982 draft. His only realistic hope of making the NBA was to stay in college. Before the draft Sangodeyi asked the NCAA to restore his eligibility because he thought he had signed only to go to tryout sessions and summer camps. After two hearings, the NCAA restored his eligibility on the basis that Sangodeyi had misunderstood the letter and had no intent to become a pro. The NCAA also encouraged the athlete to leave school because that is the only way the agent gets paid. The athlete can hire a lawyer, but only determined that the adviser was not an agent, but had acted only as a friend who had known Sangodeyi since the adviser was a Peace Corps volunteer in Nigeria. An NCAA attorney described the case as probably the only circumstances in which an undergraduate who asked to be placed on the draft list could regain his eligibility.

The interplay of the NCAA rules, designed to protect the amateur concept, and the NBA draft procuedure make the talented basketball player's situation extremely sensitive and difficult. Under NBA rules enacted after the 1981 season, teams may not contact an undergraduate unless he has placed his name on the NBA draft list. But once he has done so he forfeits his collegiate eligibility.

Consider the situation in which a Ralph Sampson or a Pat Ewing finds himself after his sophomore or junior year. He may choose to stay in school another year, or to place his name on the NBA draft list. At stake for him may be hundreds of thousands or even millions of dollars, his college degree, and his overall well-being. At

stake for the agent who becomes his representative may be 5 to 10 percent of that amount. At stake for his college coach may be the opportunity for his team to play in the final four of the NCAA tournament, or a losing season and maybe his job. At stake for the university are the hundreds of thousands of dollars that an All-American basketball player can help generate through gate receipts, television revenue, and tournament revenues. At stake for the NBA teams that would like to draft the player may be the ability to win a division title or even keep the franchise solvent. In sum the student-athlete's decision may have a cumulative multi-million-dollar impact.

Where can the student-athlete with only a year or two of college education turn for help in reaching his decision? What help can he receive without violating NCAA rules? He can talk to agents, but he cannot agree to retain one. As one college coach noted, many agents (especially those with few clients) will if the lawyer charges his normal fees. The lawyer can review offers (if there are any), he can return the contract, but he cannot make any counteroffers. The athlete can ask his coach to help, but the coach probably is not experienced in making major business deals, may be leery of violating NCAA rules, and has a vested interest in the athlete's staying in school.

One of the most respected college baskeball coaches, Dean Smith of the University of North Carolina, told Washington Post reporter John Feinstein:

I think any young man making a decision like that should have the advice of counsel. I don't think it has to be an agent. It ca[illegible]e a family attorney or longtime friend who genuinely has his best interests in m[illegible]d. The players who left school early and had problems are, for the most part, the ones who left without really knowing what they could get.

An undergraduate football player, such as a Herschel Walker, will need more legal advice than simply being told what kind of contract he can expect. He will need an experienced antitrust lawyer to advise him on the process of challenging the NFL rule against signing undergraduates and on the likelihood of succ[illegible]ding. He may even need a labor lawyer for advice on how negotiations between the players' union and management will affect the terms of any contract. The situation will become even more complex and the stakes higher if the new United States Football League signs undergraduates who would otherwise be eligible to play college football.

The athlete should also talk with former teammates about their experiences as professionals. Their advice as to whether the athlete may benefit more by playing another year in college or whether he is ready to cope with the life of a professional athlete might be vital.

One of the risks of staying in college is that an injury will diminish or even eliminate an athlete's professional value. One way to limit the potentially devastating impact of an injury is to purchase insurance. Before purchasing such insurance, an athlete should be sure that he has not obtained the money for the premium in any way that violates the NCAA rules.

In summary, the student-athlete who is considering turning pro before his college class graduates should try to become as informed as possible and should be counseled by an attorney.

Senator SPECTER. Our final witness is Mr. John Toner, president, NCAA. Mr. Toner is athletic director at the University of Connecticut.

Mr. Toner, welcome. We very much appreciate your being with us. Your statement will be made a part of the record, and we would appreciate it if, in accordance with our custom, you would summarize your statement and leave the maximum amount of time for questions and answers.

STATEMENT OF JOHN L. TONER, PRESIDENT, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, AND DIRECTOR OF ATHLETICS, UNIVERSITY OF CONNECTICUT.

Mr. TONER. Thank you, Senator Specter. I do have a summary of my statement, which I would like to read to you.

Senator SPECTER. You may proceed.

Mr. TONER. Mr. Chairman, members of the committee, my name is John L. Toner. I am current president of the National Collegiate Athletic Association, the NCAA, and director of athletics at the University of Connecticut.

I appreciate this opportunity to present to you today the views of the NCAA pertaining to S. 610, the Collegiate Student-Athlete Protection Act of 1983.

The NCAA believes that in most instances the advantages to be obtained from completing a college education far outweigh the immediate financial gain available from a premature professional commitment. At the same time, however, the NCAA believes that a student athlete should have the right to sign a professional contract during his undergraduate career, if it is in his own long term best interests to do so.

Accordingly, the NCAA never has had and does not now have rules restricting a student athlete from pursuing a professional sports career. NCAA rules define the point at which the student athlete becomes a professional athlete. Once a professional in a particular sport, an athlete no longer is eligible for intercollegiate competition in that sport.

The NCAA rules consist of clear statements that young people can understand of the circumstances in which a student athlete relinquishes his intercollegiate eligibility. In brief, a student athlete becomes a professional when he is paid for participation in a sport, enters into an agreement of any kind to compete in professional athletics, agrees to negotiate a professional contract, signs a contract or commitment to play professional athletics, or contracts to be represented by an agent in the marketing of athletic ability or reputation.

The fact that the contract is not enforceable, that the athlete is not selected for professional play, or that he later decides to withdraw from the contract has no bearing on the conclusion whether he has in fact become a professional. It is his action in taking the initiative to try to play professionally that determines whether or not he has crossed the line into professionalism, not whether he is successful in that endeavor.

The signing of Herschel Walker illustrates the application of these rules. Walker relinquished his collegiate eligibility in at least two ways. First, he had an agent negotiate on his behalf with professional football representatives. And second, he signed a contract with the New Jersey Generals, a USFL team, to play professional football.

The NCAA's primary concern——

Senator SPECTER. Let me interrupt you at that point, if I may.

Mr. TONER. Yes.

Senator SPECTER. Is it not possible that the NCAA rule was self-defeating in the sense that if Herschel Walker had not lost his eligibility at that point, that he might have stayed at college?

Is it not a very tough rule which provides no leeway for the college student to change his mind?

Mr. TONER. Senator Specter, it is my opinion that when you get to the cutting edge of any rule, at that point it becomes tough for those people who are at the cutting edge, the decisionmaking.

In this particular case, I do not think so.

Senator SPECTER. There are many contracts where consumers are provided 10 days to change their minds. Here you have a particularly vulnerable kind of person; a young age, a difficult decision, important career choices, lots of money, lots of concern for the university. To hold a young athlete to that kind of situation is difficult. The people on the other end of the contract were willing to let it stand or rescind it.

Mr. TONER. Yes.

Senator SPECTER. Would it not have been better had the NCAA rules provided some flexibility there?

Mr. TONER. Senator Specter, the NCAA rules do not preclude due process hearings. However, there is no gray area between eligibility and ineligibility. The University of Georgia's responsibility in that case was to decide whether the student athlete was eligible or ineligible. They decided he was ineligible.

At that point—at that point Herschel Walker and the institution could have asked for an appeal of that ruling to the NCAA's eligibility committee. Now, we have not had such an appeal in the sport of football or in the sport of professional contracting in the United States heretofore. But we have had one in another sport in another country. And it happened at a time when I was involved on the eligibility committee.

But there is an appeals process. I think if he were concerned about restoring his college eligibility, he could have taken that option. Whether or not he would have been successful would remain the question.

Senator SPECTER. But that really is sort of a hollow procedure, is it not? He had to make a decision. That would have taken substantial time. He might have found himself outside of the USFL and outside of the University of Georgia.

Mr. TONER. Well, I read one account where Herschel did indicate that he knew the rules as well as anyone. But I would remind all that annually all student athletes and every professional staff member of an institutional member of the NCAA must go through an exercise of reviewing the rules, of asking questions of the rules, of signing off the fact that they know and understand their options all the way.

And I believe in this particular case, the student athlete was aware of what those options were.

Senator SPECTER. Proceed.

Mr. TONER. The NCAA's primary concern is that college student athletes who sign with professional sports leagues often do not complete their undergraduate careers and fail to receive college degrees. Moreover, many student athletes who turn professional before completing their college education ultimately do not succeed in their professional athletic careers.

Statistics are sobering: in both football and basketball, only about 1 percent of college seniors are successful in their efforts to play professionally. It has been our experience that few athletes return to complete their college educations once they have interrupted it to play professional sports. The manner in which the USFL has been structured will exacerbate this problem. The USFL has indicated its intention to conduct an annual draft of college

players that will take place prior to the beginning of the USFL season, which is to begin in March of each year.

Players who are drafted will be encouraged to leave their institutions prior to completion of their senior year in order to participate in the spring in USFL competition. In addition, the NCAA believes that the actions taken by the USFL and the attitude exhibited to date by the league's leadership will encourage individuals acting as agents to contact undergraduate student athletes to try to persuade them to forego their remaining eligibility and the completion of their college education in order to obtain contracts with USFL teams.

The NCAA strongly urges the USFL and other professional sports leagues to state clearly their governing policies and practices with regard to the signing of undergraduate student athletes and then hold to those statements.

The NCAA is empathetic to the position——

Senator SPECTER. Suppose those rules violate the antitrust laws?

Mr. TONER. Well, what we are referring to are rules of other organizations than the NCAA. So, speaking——

Senator SPECTER. Well, you are urging the USFL and the NFL to adopt rules and stand by them.

Mr. TONER. Yes, but——

Senator SPECTER. What is your advice to the leagues if their attorneys tell them that their rules violate the antitrust laws?

Mr. TONER. Well, if I could see the rules that they are anticipating, I would be able to comment. But on a broad——

Senator SPECTER. How about if the leagues say the current rules violate the antitrust laws?

Mr. TONER. Well, in the sport of football, it has not been tested, and it has endured quite a few years, so that I would say that it has been treated as an advantage to both parties, the college student athlete and the National Football League. I do not know what will happen in the future if we continue to grow in professional football opportunities.

NCAA is empathetic to the position of college coaches, that the drafting of athletes prior to completion of their college eligibility disrupts the intercollegiate sports program in which those athletes compete.

The NCAA is in favor of measures to reduce the pressure on college coaches and it does not want to encourage drafting of student athletes who have not completed their college education and who have eligibility remaining.

Nonetheless, the NCAA does not believe that a student athlete should be denied the opportunity to choose to become a professional player prior to completion of his undergraduate education.

If Congress wishes to insure the enforceability of professional league rules encouraging student athletes to complete their undergraduate education, the NCAA agrees that an exemption from the antitrust laws would be necessary. We disagree with the suggestion that the prohibitions implied by the *Haywood* case can be avoided by the establishment of some form of a screening committee to determine, on the basis of skill, maturity or economic need, which student athletes will be authorized to turn professional before completing their intercollegiate eligibility and which will not.

In any event, we do not consider this to be a wise policy. We do not believe that the present number of student athletes who are tempted to sign prematurely warrants the adoption of a national policy to prevent an individual from having that choice.

The NCAA remains principally concerned by the fact that there are student athletes of many colleges who do not receive their degrees following completion of athletic eligibility. And NCAA member institutions are committed to improving this state of affairs.

For all these reasons, the NCAA does not support S. 610 in its present form.

The bill would give the professional sports leagues unrestrained license to adopt whatever draft rules they choose with no assurance that the rights of others, most importantly student athletes, would be protected. Our position, however, does not imply opposition to any legislation on this issue.

If a proposal——

Senator SPECTER. Mr. Toner, may I interrupt you for just 1 minute, please. There is a phone call that I must take.

Mr. TONER. Yes.

[Brief recess.]

Senator SPECTER. There was a snarl on the jobs bill, the Kasten amendment, and they had a unanimous consent agreement pending on the floor, and I had an objection pending which I had to be consulted about. So, sorry for the interruption. You may proceed again, Mr. Toner.

Mr. TONER. I am almost through with my summary.

Senator SPECTER. All right. Fine.

Mr. TONER. To continue, the NCAA position, however, does not imply opposition to any legislation on this issue if a proposal is developed which offers protection for student athletes' rights while at the same time permitting enforcement of league rules under which professional sports clubs agree to exercise restraint in soliciting the services of student athletes.

That concludes the summary, Senator, and I would be very happy to answer questions.

ATTORNEY CONSULTATION RIGHTS

Senator SPECTER. Thank you, Mr. Toner. With respect to the NCAA rule which prohibits a player from consulting with an attorney, how can a college student understand what his rights are and what his options are if he is precluded from consulting with an attorney?

Mr. TONER. He is not precluded from consulting with an attorney at any time. The one thing he is precluded from doing is directing an attorney or any other party to market his name or his athletic ability.

Senator SPECTER. Well, that is a difficult conclusion to draw from a rule which says, "Any individual who contracts or who has ever contracted, orally or in writing, to be represented by an agent in the marketing of the individual's athletic ability or reputation in a sport no longer shall be eligible for intercollegiate athletics in that sport."

The issue is whether he should contract to engage in professional sports. And the person whom he would naturally consult would be an agent-attorney. And the question he has to decide is whether he should enter into a contract to become a professional athlete.

Mr. TONER. Well, there is nothing to prevent him, once he is faced with a contract, from asking an attorney's advice or any other person's advice on what that contract really means and what his options might be.

Senator SPECTER. But he does not face the contract issue until he has an agent. Are you saying——

Mr. TONER. It seems to me that the previous—Willie Young indicated that he directly negotiated with a member of a football team, not an agent, or not his agent.

Senator SPECTER. Well, if this rule obliges a man like Willie Young to negotiate directly with a professional football team, isn't that highly questionable as a matter of good policy?

Mr. TONER. Well, I would say it would be questionable policy for any student athlete that I would be coaching to do.

Senator SPECTER. Sure. With all due respect to anybody on the other side of any arrangement, a student in that capacity ought to have an attorney who is representing his interests, who can understand the complexities of the transaction.

Mr. TONER. The NCAA does not dispute that. But at that point——

Senator SPECTER. But your rule really flies in the face of that reality. I think you could read the rule to say that before a student will contract with an agent, that the NCAA would permit him to hire an attorney to give him advice as to whether he should contract with an agent. But that is pretty tough stuff.

Mr. TONER. Senator, later on in that same paragraph, the sentence beginning:

> Securing advice from a lawyer concerning a proposed professional sports contract shall not be considered contracting for representation by an agent under this rule, unless the lawyer represents the student athlete in negotiations for such a contract.

Senator SPECTER. I said that he could consult with an attorney. If an agent comes to a player and says, "I would like to give you advice on becoming a professional athlete," the player cannot accept such advice under your rule. He can go to a lawyer and say, "should I consider hiring this man to be my agent." Or if somebody has presented him with a contract, as the Blitz did to Willie Young, the player can then go to a lawyer and consult with him on that contract.

But in the real world attorneys are attorney agents who are hoping to represent the person in becoming a professional athlete.

Mr. TONER. Well——

Senator SPECTER. I understand your point, and I think you understand mine.

Mr. TONER. I do, and that is why we are at that cutting edge. And if it were not right there, where would it be? I still believe that whenever the decision point is reached, there is a similar cutting edge.

Senator SPECTER. Well, the content and likely impact of these rules is obviously up to you and the NCAA. One rule which obvi-

ously concerns me relates to a player's right to be effectively represented by an attorney, an attorney who may be an attorney agent, in order to make a preliminary determination about whether to turn pro. Another question I have is whether a young, inexperienced youth shouldn't be given some period of grace, an opportunity to consider the pros and cons of these hard decisions, and perhaps even the right to change his mind. I'm also concerned that some of these rules may be difficult to read and comprehend for some college students.

Mr. TONER. Senator, if I may, at the very end of the paragraph that we were both reading from, there is a reference about revisions made in August 1, 1974, January 17, 1976, and January 10, 1979, and also references to cases. If I may, I would like to add numbers of cases that your staff could consider that relate to the use of agents, professional contracts.

Cases Nos. 3 and 4 do not relate to the things that we are talking about today surrounding Herschel Walker. And there are references at the end of the paragraph. But 32 and 33 may. But in addition to those cases 15, 16, and 17, 18, and 19, cases 27, 31 could be added that could clarify many of the questions that you may have.

Senator SPECTER. Mr. Toner, the concern I have is that if Herschel Walker or Willie Young picks up these NCAA rules and sees all of these cases, sees the revisions, sees the rule, he might not know quite what to do. It might be pretty hard for him to really understand such a rule, and if there were a simpler arrangement where he could consult with and be advised by someone at an earlier stage, my suggestion to you is that this might be desirable.

It may come to pass that there will be another date following the word "revised."

Mr. TONER. Well, we meet annually, and we change a lot of rules each year. This one has been rather dormant. We have not had this kind of a question about this rule until this day.

Senator SPECTER. Sure.

Mr. TONER. But I just do not want you to feel that I am leaving this hearing without repeating the fact that one can seek advice about interpretations and about professional contracts without endangering eligibility for intercollegiate activity.

Senator SPECTER. Well, I agree with you that there are lines which can be followed by someone who is well advised, but it is a difficult line, given the fact that the people who are in the field are agent attorneys who are really looking forward to pushing the player into professional athletics.

Mr. TONER. Yes, sir.

Senator SPECTER. That is the reality, and that is the difficulty.

Mr. TONER. I was particularly struck by Willie Young's statement that he did not choose to consult with people at the University of Illinois about all of the decisions that led to his unfortunate experience.

Senator SPECTER. Well, I think there is a lot of pressure on these young men at that particular time, and it requires a lot of talk by a lot of us to see if we can structure an arrangement where there is more equity, more advice, and a better general result.

We very much appreciate your being here, Mr. Toner.

[Prepared statement of John L. Toner follows:]

PREPARED STATEMENT OF JOHN L. TONER

Mr. Chairman and members of the Committee, my name is John L. Toner. I am the current President of the National Collegiate Athletic Association ("NCAA"), an association of 961 colleges and universities, allied athletic conferences, associate institutions and affiliated organizations. I am also Director of Athletics at the University of Connecticut. I appreciate the opportunity to present to you today the views of the NCAA on S. 610, the Collegiate Student-Athlete Protection Act of 1983.

In light of the recent action of the United States Football League ("USFL") permitting one of its teams to sign a student-athlete, Herschel Walker, to a professional football contract before his collegiate eligibility expired, the NCAA wishes to make clear its view that in most instances, the advantages to be obtained from completing a college education far outweigh the immediate financial gains available from a premature professional commitment.

It is the position of the NCAA that student-athletes should be encouraged to complete their college education. At the same time, however, the NCAA believes that a student-athlete should have the right to sign a professional contract during his undergraduate career if it is in his own long-term, best interest to do so. Accordingly, the NCAA never has had and does not now have rules restricting a student-athlete from pursuing a professional sports career. Similarly, the NCAA neither has nor seeks any agreement with professional sports leagues to preclude or limit the opportunity of a student-athlete to "turn professional."

The NCAA Constitution provides that a basic purpose of the NCAA is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports."

Consistent with this policy, NCAA rules define the point at which a student-athlete becomes a professional athlete. Once a professional in a particular sport, an athlete no longer is eligible for intercollegiate competition in that sport. The NCAA rules consist of clear statements that young people can understand of the circumstances in which a student-athlete relinquishes his intercollegiate eligibility. The NCAA publishes a short summary of its rules relating to amateurism and eligibility in a pamphlet entitled A Guide for the College-Bound Student-Athlete. The nation's high schools and NCAA member colleges and universities distribute this pamphlet to prospective student-athletes during the recruiting process. We have provided the Committee the most recent editions of the pamphlet and the NCAA Manual, which contains NCAA rules and interpretations thereof.

In brief, NCAA rules provide that a student-athlete becomes a professional when he is paid for participation in a sport, enters into an agreement of any kind to compete in professional athletics, agrees to negotiate a professional contract, signs a contract or commitment to play professional athletics, or contracts to be represented by an agent in the marketing of his athletic ability or reputation. In other words, a student-athlete crosses the line from amateurism to professionalism when he takes the initiative to become a professional.

The signing of Herschel Walker illustrates the application of these rules. Walker relinquished his collegiate eligibility in at least two ways. First, he had an agent negotiate on his behalf with professional football representatives. Second, he signed a contract with the New Jersey Generals, a USFL team, to play professional football.

A student-athlete does not turn professional simply by receiving an offer from a professional sports league or securing advice from an attorney concerning a proposed professional sports contract. It is only once the student-athlete affirmatively takes steps to offer his services to professional sports teams

that he is considered to have become a professional. The fact that the contract is not enforceable, that the athlete is not selected for professional play or that he later decides to withdraw from the contract has no bearing on the conclusion whether he has become a professional. It is his action in taking the initiative to try to play professionally that determines whether or not he has crossed the line into professionalism, not whether he is successful in that endeavor.

The NCAA's primary concern is that college student-athletes who sign with professional sports organizations often do not complete their undergraduate careers and fail to receive college degrees. The NCAA is more concerned with the possiblity that a student-athlete will not complete his college education than with the possibility that he will not complete his eligibility. Moreover, many student-athletes who turn professional before completing their college eligibility and their college education ultimately do not succeed in their professional athletic careers. The statistics are sobering. In both football and basketball, only about one percent of college seniors playing those sports at NCAA member colleges and universities are successful in their efforts to play professionally.

Although statistics are not available, it has been our experience that few athletes return to complete their college education once they have interrupted it to play professional sports.

The manner in which the USFL has been structured will exacerbate this problem and is likely to result in a marked increase in the number of student-athletes who do not complete their educational careers. Not only has the USFL permitted a student-athlete with eligibility remaining to sign a professional contract prior to his graduation from college, it also has indicated its intention to conduct an annual draft of college players that will encourage the selected individuals to leave college prior to completion of their senior year. These annual

draft sessions will take place prior to the beginning of the USFL season, which is to begin in March of each year, and the players who are drafted will be encouraged to leave their institutions in order to participate during the spring in this competition. College football players who have completed four seasons of eligibility in the fall of their senior year thus are more likely to leave college after their seventh semester, before their graduation from college, in an effort to play professional football with a USFL team than they would be in the case of NFL teams, where both practice and the playing season take place after the close of the academic year.

In addition, the NCAA believes that the actions taken by the USFL, and the attitude exhibited to date by the league's leadership, will encourage individuals acting as agents to contact undergraduate student-athletes to try to persuade them to forgo their remaining eligibility and the completion of their college education in order to obtain contracts with USFL teams. Although premature signings with other professional sports leagues have occurred, those leagues have avoided many potential problems by announcing their policies and practices and adhering to them, thus allowing affected parties to plan accordingly. Based upon the USFL's record to date, it is not certain that the USFL is prepared to do that.

The NCAA strongly urges the USFL and other professional sports leagues to state clearly their governing policies and practices with regard to the signing of undergraduate student-athletes, and then to hold to those standards.

The NCAA is empathetic to the position of many college coaches that the drafting of athletes prior to completion of their college eligibility disrupts the intercollegiate sports program in which those athletes compete. We understand their concern that the action of the USFL in permitting the signing of Herschel Walker may lead to widespread recruiting of college football players in the absence of professional league rules

barring such recruitment. The NCAA is in favor of measures to reduce the pressure on college coaches and it does not want to encourage the drafting of student-athletes who have not completed their college education and who have eligibility remaining. Nonetheless, the NCAA does not believe that a student-athlete should be denied the opportunity to choose to become a professional player prior to completion of his undergraduate education.

If Congress wishes to ensure the enforceability of professional league rules encouraging student-athletes to complete their undergraduate education, the NCAA agrees, based upon the Spencer Haywood case*/ and advice from its legal counsel, that an exemption from the antitrust laws would be necessary. We disagree with the suggestion that the prohibitions implied by the Haywood case can be avoided by the establishment of some form of "screening committee" to determine -- on the basis of skill, maturity or economic "need" -- which student-athletes will be authorized to "turn professional" before completing their intercollegiate eligibility, and which will not. In any event, we do not consider this to be a wise policy.

We do not believe that the present number of student-athletes who are tempted to sign prematurely warrants the adoption of a national policy to prevent an individual from having that choice. The NCAA, however, remains principally concerned by the fact that there are student-athletes at many colleges who do not receive their degrees following completion of their athletic eligibility, and the NCAA member institutions are committed to improving this state of affairs.

I would be pleased to answer any questions that Committee members may have.

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*/ Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

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The National Collegiate Athletic Association

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June 6, 1983

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WALTER BYERS

The Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
218 Russell Senate Office Building
Washington, D.C. 20510

Re: S. 610

Dear Chairman Thurmond:

This letter will provide additional informat on and clarify the position of the NCAA on certain points raised during the March 17 hearing chaired by Senator Specter on the Collegiate Student-Athlete Protection Act of 1983 (S. 610).

An accurate summary of the principles adopted by the NCAA membership, concerning the point at which a student-athlete professionalizes himself, is that he becomes a professional in a sport (and no longer is eligible for intercollegiate competition in that sport) when he takes or initiates conscious affirmative steps to negotiate or enter into a professional contract, participates as a professional athlete, or receives remuneration for sports participation. More passive activities short of these steps do not result in professionalization. Moreover, in those limited number of instances in which a student-athlete unwittingly has professionalized himself, he normally is able to regain his intercollegiate eligibility through appeal to internal NCAA bodies.

NCAA constitutional and bylaw principles in this area are drawn in such a fashion as to accomplish two purposes deemed important by the NCAA membership: (1) to provide a clear and readily understandable line of demarcation between amateur and professional status, and (2) to provide major disincentives to prospective agents or other representatives of professional sport becoming involved in the educational process.

Thus, as I explained in my statement to the Committee on March 17, NCAA rules specify the following instances in which a student-athlete relinquishes college eligibility in a sport:

-- if he receives or agrees to receive payment for participation;

-- if he agrees to compete in professional athletics or to negotiate a professional contract;

-- if he directly or indirectly uses his athletic skill for pay, signs a contract to play professional athletics in a sport, or plays on a professional athletic team; or

-- if he contracts orally or in writing for an agent to represent him in the marketing of his athletic ability or reputation.

Receipt of an unsolicited offer from a professional club or a professional sports agent does not affect the eligibility of a student-athlete. Correlatively, a student-athlete is permitted to contact a professional club to ask the club what his value would be in the event he were to decide to professionalize himself. He would become a professional under these circumstances only if he followed up a professional offer by thereafter attempting to negotiate a better offer.

During the March 17 hearing, some confusion appeared to exist as to the entitlement of a student-athlete to consult an attorney and still retain his eligibility. The NCAA Constitution expressly states that a student-athlete may contact an attorney for advice about an offer from a professional club without jeopardizing his eligibility for intercollegiate competition. Similarly, such an attorney for a student-athlete could be employed to contact a professional team to attempt to determine the student's value as an athlete -- just as the student-athlete is entitled to contact the team himself.

In general terms, NCAA rules in no way limit the right of a student-athlete to explore with his attorney, his coach, other athletic department personnel, or persons other than those acting as representatives of professional sports teams, the process by which he might become a professional or the desirability of his becoming a professional. In this context, a student-athlete is considered to have professionalized himself only when he instructs his attorney, or some other agent acting on his behalf, to negotiate with a professional club for purposes of becoming a professional athlete.

The line between professionalism and eligibility for intercollegiate play must be drawn somewhere, and it has been incumbent upon the NCAA membership to determine where that line should be drawn. Without argument, the NCAA membership has drawn the line at a point which equates virtually any conscious affirmative steps toward the marketing of athletic ability, either with or without the assistance of an attorney or agent, with loss of intercollegiate eligibility. At the same time, however, the student-athlete is permitted -- without risk of loss of eligibility -- fully to explore with competent advisers the meaning and intent of NCAA rules and the potential benefits which might accrue in the event he were to decide to professionalize himself.

There is no doubt, moreover, that the NCAA membership believes that it is not in the interest of student-athletes, intercollegiate athletics or the educational process for NCAA rules to authorize the involvement by agent-marketers of athletic talent or representatives of professional clubs in the decision-making process. Contrary to allegations made by some, the NCAA rules in this respect are not intended to require student-athletes to exhaust their eligibility in intercollegiate athletics before pursuing a professional career. Rather, they are designed to permit the student-athlete to consider the fundamental issue of professionalization under circumstances in which he has basic information necessary to decide that issue, without being subjected to the pressures that can arise from the involvement of an agent whose sole incentive ordinarily would be the reaping of rewards from a decision to professionalize.

Question was raised at the March 17 hearing as to why a student-athlete, once having consciously made the decision to professionalize himself, should not be allowed to "change his mind" and reestablish himself as eligible for intercollegiate competition. The answer to this question is twofold: (1) adoption of such a principle would completely open the door to prospective agents and other representatives of professional interests to become involved in the educational process in general and in the student-athlete's decision-making process in particular; and (2) such a principle would invite endless debate and necessary decisions as to how far the student-athlete would be permitted to negotiate for -- and indeed pursue -- a professional career before he no longer would be eligible to regain his eligibility for intercollegiate play. If Herschel Walker, having consciously decided to sign a professional football contract, were permitted to regain his eligibility for intercollegiate play two days later (before he had ever stepped onto a professional practice field), should he then also be entitled to regain his eligibility if he were to participate in professional practices and then recant, participate in some professional games and then be "cut", participate in a professional season, and so on?

Additional question was raised during the course of the hearings whether student-athletes in fact understand the NCAA rules relating to professionalism. My own view is that except in rare instances, they understand them very well. Both the NCAA and its members make major efforts to inform student-athletes concerning NCAA rules and the limits they impose. For example, through its Professional Sports Liaison Committee, the NCAA has worked with an attorney to prepare a volume for students that explains NCAA rules and provides information about selecting an agent. In addition, the NCAA staff is available, and is known by every NCAA-member institution to be available, to the institutions and their student-athletes to answer questions concerning the application of NCAA rules.

Similarly, the NCAA members themselves have been aggressive to insure that their student-athletes understand NCAA rules. Coaches and other athletic department representatives review NCAA rules with student-athletes at least on an annual basis, and are continuously available to respond to specific questions and to offer advice to student-athletes concerning the process of becoming a professional. It simply is not credible to assume that a student-athlete of Herschel Walker's caliber has not been given the opportunity for detailed review of the NCAA rules concerning professionalism -- particularly in light of the fact that it can be assumed that his coaches themselves possess a major interest in his not unwittingly professionalizing himself before completion of his intercollegiate athletic career.

It seems apparent that Herschel Walker's decision to become a professional in the middle of his junior year at the University of Georgia provided the impetus for the introduction of S. 610. As is true of outstanding student-athletes generally, Mr. Walker in fact was well-versed in the NCAA rules on professionalism. I am advised that he discussed the rules with his coach, Vince Dooley, and with other members of Georgia's athletic department. During his sophomore year, when he was considering whether to sue the National Football League in connection with its draft rules, the NCAA staff spoke on at least three occasions with Mr. Walker's attorney, Jack Manton, concerning the NCAA rules -- in order to assist Mr. Walker and his attorney fully to understand his options concerning continued collegiate eligibility.

I understand that before Mr. Walker actually signed his contract with the New Jersey Generals, he did not seek advice from his coach or the NCAA. Nor does it appear that the process by which he professionalized himself was the

result of some allegedly obscure "technicality" in NCAA rules -- he and his attorney clearly understood the NCAA rules, and he clearly demonstrated an intention to play professional football by signing a contract with a professional football team.

Unlike Mr. Walker's case, there are a limited number of instances in which a student-athlete -- either because of a lack of advice or more often because of incorrect advice -- unwittingly takes a step which results in his having professionalized himself under NCAA rules. A procedure exists within the NCAA structure to deal with these instances: if a student-athlete, having professionalized himself, wishes to attempt to regain his eligibility for intercollegiate athletics, he is entitled to a hearing, before the NCAA Eligibility Committee, for a review of his status. The determinative question in these cases generally has been whether the student-athlete in fact intended to professionalize himself -- in which event the Committee has not restored eligibility -- or, as is more often the case in appeals before it, whether the student for some reason had not formed an intent to become a professional -- in which event the Committee has generally authorized the restoration of eligibility.

The Eligibility Committee has restored the eligibility of the student-athlete in question in twenty-two of the twenty-six cases concerning amateurism heard by the Committee since 1979. For example, the Committee restored the eligibility of a prospective student-athlete who had participated in a professional baseball camp. The young man had attended the camp at the urging of friends and school administrators in his home town and had not intended to become a professional baseball player. He did not sign a contract or commit himself to play professional baseball.

In another case, the Committee last summer restored the eligibility of a student-athlete who had not read the letter that he had signed submitting his name for the NBA "draft". The athlete was misled by a consultant to believe that he was simply requesting the opportunity to play during the summer in recreational playing centers against NBA players, and that such activity would not affect his collegiate eligibility. Upon learning what he had done, the athlete withdrew his name prior to the draft. The Committee found that the student-athlete was seeking the opportunity to improve his basketball skills by participating against talented players, and had not intended to become a professional player at that time. The Committee expressed concern that the university, which was a new NCAA member, make greater efforts to educate its student-athletes about NCAA eligibility rules.

Finally, I would simply like to make reference to a subject that is at the heart of S. 610 -- that is, graduation rates for student-athletes. In 1975, the NCAA commissioned the American College Testing Program to study the five-year graduation rates from a representative sample of male students, including both athletes and non-athletes. The study was released in April 1981. The results show that an average of 52 percent of athletes graduated, whereas an average of 41.5 percent of non-athletes graduated. Attached for the Committee's reference is a copy of the study.

I appreciate this opportunity to supplement the NCAA's testimony on S. 610, and ask that this letter be incorporated as a part of the record of proceedings. We would be pleased to provide any additional information you or your staff may wish to have.

Very truly yours,

John T. Toner

John L. Toner

JLT/dmh
Attachment

cc: The Honorable Arlen Specter

107301

National Collegiate Athletic Association
Survey of Graduation Rates After Five Years
for Males First Entering College in Fall 1975

April 1981

Prepared by

Institutional Services Department
Research and Development Division
American College Testing Program
Iowa City, Iowa

THE PROBLEM AND PURPOSE OF THE STUDY

Background and Data

In the Spring of 1975 the NCAA entered into an agreement with the American College Testing Program to survey the member colleges of the NCAA to learn if the graduation rates of student-athletes who win varsity athletic awards are comparable to the graduation rates of non-athlete male students. The survey was mailed to the athletic directors of 692 member colleges of the NCAA. After two follow-up letters, usable data were received from a total of 175 member colleges. Because of the poor response rate, the statistics had to be interpreted with caution since data from responding colleges may have differed from non-responding colleges.

At the time the results of the survey were shared with the NCAA it was recommended by ACT that the study may have provided more valuable data if opportunity had been given to the colleges to track entering freshmen students over a period of time. During the survey process, many colleges indicated to ACT (Spring 1975) that records were not available or were very difficult to find. In addition, many colleges indicated that they were not prepared or organized to respond to a survey which required so many hours of clerical auditing of records. ACT believed that if colleges would be able to plan the clerical tasks associated with tracking the progress of male students, the information would be improved. In addition, colleges would have the opportunity to get a clear picture of the work involved before they agreed to participate.

As a result, the NCAA entered into an agreement with ACT in the Winter of 1975 to study the 5-year graduation rates of a representative sample of male students (both athlete and non-athlete) at participating NCAA colleges and

universities. Initially, ACT and NCAA decided to select a random sample of 200 institutions from Divisions I-III to be included in the study. A total of 125 colleges were selected from Division I, 50 were selected from Division II, and 25 were selected from Division III. These institutions were sent a letter of invitation to participate in the survey in April of 1976 (see Appendix A) along with a memorandum from President John A. Fuzak (Appendix B) that outlined the purpose of the survey. A total of 115 colleges and universities agreed to participate in the survey. In some cases the Director of Athletics asked ACT to send the survey materials to a more appropriate office on the campus for record-keeping activities. The rest of the colleges coordinated the data collection activity through the Office of the Director of Athletics. The letter of instruction (Appendix C), procedures to be followed in collecting and recording data (Appendix D), and an appropriate number of survey forms (Appendix E) were mailed to the 115 colleges in May 1976.

During the course of the five year data collection effort, ACT sent a copy of the previous year's completed roster to the individual colleges that actually returned data to ACT. A few colleges elected to maintain their own records, but most colleges returned the data after several additional efforts were made by ACT to remind the colleges of the importance of the study.

A typical letter sent to the colleges each year is reported in Appendix F. Data were received covering the 5-year period after repeated efforts by phone and mail from 46 colleges and universities.

Related Research

Recent research has been reported by Pantages and Creedon (1978) that indicates only 4 out of 10 students who enter a college in the United States graduate four years later. Further, they report that eventually about 5 of the 10 entering students will graduate from the same college. They report that of the 5 students who leave a college altogether, four will re-enroll at a different college, and of those four enrollees, only two will graduate.

Eckland and Wisenbaker (1979) reported that of those who entered academic programs in the Fall 1972, 39% had obtained a bachelor's degree by October 1976, 26% were still enrolled, and 35% had dropped out. Women were more likely than men to have graduated on schedule. As reported in the article by Pantages and Creedon, earlier studies by Summerskill (1962) and Eckland (1964) reported that after four years of college only 37% of the entering freshmen actually graduated from the college. However, the rates of attrition for men and women

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differ. Some researchers have found that men tend to drop out more than women, and in other studies women dropped out more frequently than men.

A recent study on graduation rates by sex was reported by Newlon and Gaither (1980), based on students who entered California State University, Northridge. Based on students who entered from Fall 1971 through Fall 1977, the authors reported that males revealed a more positive persistence rate than did females. They reported 32% of the males who first entered college in the Fall of 1971 were still enrolled after the 8th semester, whereas only 29% of the females were still enrolled.

Cope (1978) reported recently that although gross national retention rates have remained relatively constant, there are substantial differences in rates of retention among different types of colleges. The most selective institutions generally having substantially higher rates of retention. The range of retention rates reported by Cope is illustrated in Table 1.

TABLE 1

Estimated Retention Rates According to Institutional Selectivity[a]

Type of Institution	Percentage Graduating In Four Years At Initial Institution	Percentage Graduating Within 10 Years At Same Institution
Most Selective Private	80-90	90-95
Large State Universities	30-45	50-70
Regional State Universities	15-25	30-45
Public Community Colleges	15-25[b]	10-15[c]

[a]Rates are estimated from data in follow-up studies by Astin (1972, 1975), Bayer and others (1973), and Newman (1971).

[b]Graduation from a two-year program in two years.

[c]Graduation from a four-year program after transfer.

Beal and Noel (1980) surveyed officials at 990 colleges to determine what efforts work best to retain students. Part of their survey requested college officials to report graduation rates after five years of college. They reported college graduation rates after five years of college from 56%-77%.

It seems clear that wide variation exists in the graduation rates of individual colleges, but that generally one might expect between 35%-45% of the male students to have graduated from the institution they originally entered

five years earlier. The purpose of this survey was to determine if freshmen athletes tended to graduate after five years at a rate similar to that of non-athletes. The data were examined by sport, as well as over all sports.

RESULTS

Educational Major

Each year during the survey ACT received updated information about the enrollment status of the male students being tracked in the study. Colleges were asked to verify previous data reported to ACT regarding academic major, enrollment status, and sport participation. For purposes of this report, the enrollment status was analyzed for the male students from the 46 colleges according to their sport status reported for the Fall of 1975. In other words, we tried to determine the status of students who began a program of athletics when they first entered college.

The data in Table 2 describe the enrollment status of the entire sample of 36,365 males by last reported educational major. The educational fields with the largest five-year graduation rates were: foreign language, social science, business and commerce, and engineering. The graduation rate across all colleges was 42.4%, which compares favorably with previous research. It is important to note that 14.4% of the men were still taking class work in the Spring of 1980. As a result, a total of 56.8% of the men who first entered in the Fall of 1975 had not dropped or transferred to another college.

Table 3 reports the enrollment status of athletes across the 46 colleges. A total of 52.0% of the athletes who first entered the 46 colleges in the Fall of 1975 had graduated by Spring 1980. As of Spring 1980, only 35.1% of the total group of athletes had dropped or transferred from the college in which they initially enrolled in the Fall of 1975.

The enrollment status of male non-athletes (32,419) is reported by educational major in Table 4. The educational fields with the greatest proportion of graduates during the five-year period in descending order were: foreign

TABLE 2

Distribution of Enrollment Status in 46 Colleges of All Males, as of Spring 1980, Who First Entered College in the Fall 1975

Education Major 1978-79	N	Enrollment Status Across Colleges (In Percent) Enrolled	Dropped/Transferred	Graduated
Agriculture	405	14.1	44.0	42.0
Architecture	337	23.1	30.7	46.3
Biological Science	2160	14.3	37.6	48.1
Business Commerce	7804	11.7	33.4	54.9
Communications	1164	13.3	40.4	46.3
Computer/Information	360	21.1	26.7	52.2
Education	1768	16.5	41.6	42.0
Engineering	3310	16.7	29.7	53.6
Fine/Applied Arts	1153	21.1	49.0	29.9
Foreign Language	173	13.3	25.5	61.3
Health Profession	1102	19.6	48.5	31.9
Home Economics	16	6.3	50.1	43.8
Letters	1589	10.3	42.5	47.3
Mathematics	555	12.6	38.7	48.6
Physical Science	1364	16.9	30.6	52.5
Community Service	684	15.2	43.9	40.9
Social Science	4903	15.7	28.1	56.1
Trade/Industry/Technical	522	11.7	64.2	24.1
General Studies	1088	16.8	67.4	15.7
Other	5908	12.6	76.2	11.2
Total	36,365	14.4	43.2	42.4

TABLE 3

Distribution of Enrollment Status in 46 Colleges as of Spring 1980 for Male Athletes Who First Entered College in Fall 1975

Group	N	Enrollment Status Across Colleges (In Percent) Enrolled	Dropped/ Transferred	Graduated
All Male Athletes	4065	12.9	35.1	52.0

TABLE 4

Distribution of Enrollment Status in 46 Colleges of Male Non-Athletes, As of Spring 1980, Who First Entered College in Fall 1975

		Enrollment Status Across Colleges (In Percent)		
Education Major 1978-79	N	Enrolled	Dropped/Transferred	Graduated
Agriculture	367	14.7	43.1	42.2
Architecture	302	24.2	32.4	43.4
Biological Science	1953	14.4	38.4	47.2
Business/Commerce	6974	11.8	33.9	54.4
Communications	1094	13.0	40.9	46.1
Computer/Information	325	21.8	27.4	50.8
Education	1367	15.3	40.2	44.6
Engineering	2866	18.2	30.7	51.0
Fine/Applied Arts	1102	21.2	49.1	29.7
Foreign Language	164	14.0	26.8	59.1
Health Profession	1037	19.4	49.2	31.4
Home Economics	16	6.3	50.1	43.8
Letters	1439	10.6	43.2	46.3
Mathematics	496	13.3	40.3	46.4
Physical Science	1171	17.8	31.2	50.9
Community Service	568	14.1	43.5	42.4
Social Science	4333	16.3	29.1	54.6
Trade/Industry/Technical	483	10.8	64.8	24.4
General Studies	976	15.8	68.1	16.1
Other	5386	12.1	77.1	10.8
Total	32,419	14.5	44.0	41.5

*To be included in this table the institution had to report the educational major for the student.

language, social service, business and commerce, and engineering. Overall, 41.5% of the non-athletes had graduated by Spring 1980, and 14.5% of the non-athletes were still enrolled.

The graduation rates for male athletes in the 46 colleges by last reported educational major are given in Table 5. The educational majors in which the greatest proportion of male athletes graduated were: foreign language, social science, business and commerce, physical science, and computer/information science.

Inspection of the results shown in Tables 4 and 5 indicate that male athletes graduated at a higher rate (50.1) at the 46 colleges than was true of male non-athletes (41.5).

Type of Sport

In addition to knowing the graduation rates of athletes and non-athletes by educational major, it is important to know the graduation rates of athletes represented in various sports. The data in Table 6 report the 5-year enroll-

ment status of all male athletes across the 46 colleges included in the study. That is, the data were collapsed into one large pool of athletes, the total being 3963. The data have been reported for several major sports, and the data for all additional sports activity have been collapsed into one group called "all other sports". Although the graduation rates for athletes involved in football and basketball were significantly less than the graduation rates for male athletes in other sports, the rate at which the athletes at these 46 colleges graduated compares very favorably with graduation rates of all students from previous research studies. A greater proportion of athletes who participated in football were still enrolled than was true for other sports.

TABLE 5

Distribution of Enrollment Status in 46 Colleges of Male Athletes, As of Spring 1980, Who First Entered College in Fall 1975

		Enrollment Status Across Colleges (In Percent)		
Education Major 1979-80	N	Enrolled	Dropped/Transferred	Graduated
Agriculture	38	7.9	52.6	39.5
Architecture	35	14.3	14.3	71.4
Biological Science	207	13.0	30.4	56.5
Business/Commerce	830	10.7	30.2	59.2
Communications	70	18.6	31.4	50.0
Computer/Information	35	14.3	20.0	65.7
Education	401	20.7	46.1	33.2
Engineering	444	6.8	23.4	69.8
Fine/Applied Arts	51	17.6	47.1	35.3
Foreign Language	9	--	--	100.0
Health Profession	65	23.1	38.5	38.5
Home Economics	--	--	--	--
Letters	150	7.3	35.3	57.3
Mathematics	59	6.8	25.4	67.8
Physical Science	193	10.9	26.9	62.2
Community Service	116	20.7	45.7	33.6
Social Science	570	11.1	20.8	68.1
Trade/Industry/Technical	39	23.1	56.4	20.5
General Studies	112	25.9	61.7	12.5
Other	522	18.2	66.6	15.1
Total	3946*	13.6	36.4	50.1

*To be included in this table the institution had to report the educational major for the student.

TABLE 6

Distribution of Enrollment Status in 46 Colleges as of Spring 1980
For All Male Athletes Who First Entered College in Fall 1975--By Sport

Sport	N	Enrollment Status Across Colleges (In Percent) Enrolled	Dropped/Transferred	Graduated
1. Football	1047	16.4	40.7	42.9
2. Basketball	308	12.3	45.8	41.9
3. Wrestling	297	13.5	39.1	47.5
4. Baseball	363	11.3	42.2	48.6
5. Track	522	14.6	34.6	50.8
6. All Other Sports	1426	11.8	30.5	57.7
TOTAL	3963	13.5	36.6	49.9

*To be included in this table the institution had to report the sport for the student.

The median graduation rate for the individual colleges included in this study are reported in Table 7. The median college 5-year graduation rate for all entering males of 1975 was 35.3%, with the median college year 5-year graduation rate for male non-athletes equal to 33.8%. Male athletes typically graduated at a rate higher than non-athletes, 36.9% to 33.8%. Although football players and basketball players tended to have a median 5-year graduation rate that was less than athletes in other sports, the 5-year graduation rate was typically higher than it was for non-athletes in the 46 colleges. The data in Table 7 also indicate that there was a greater tendency for male athletes to still be enrolled after the 5-year period than was true for non-athletes.

SUMMARY

This study grew out of an earlier study (Spring 1975) that ACT conducted for the NCAA regarding graduation rates of male undergraduates, both athletes who won varsity letters and non-athletes. Because many colleges were not equipped to monitor enrollment status of their students, the NCAA asked ACT to identify a sample of colleges and universities that would agree to monitor the enrollment status of both athletes and non-athletes over a five year period.

ACT initially identified 200 colleges to be included in a five year study of enrollment status of males who first entered college in the Fall of 1975. A total of 115 colleges agreed to participate, but usable data was only collected from 46 colleges. However, the data collected for the sample of 46 colleges was carefully checked and monitored over the five year period of the study.

TABLE 7

Median Enrollment Status in 46 Colleges as of Spring 1980
For Males Who First Entered College in Fall 1975
(In Percent)

Group	Median Percent Still Enrolled	Median Percent Graduated
All Males	13.0	35.3
Non-Athlete Males	12.2	33.8
Male Athletes-Total	14.7	36.9
1. Football	17.6	34.3
2. Basketball	0.0	37.8
3. Wrestling	8.0	42.6
4. Baseball	8.9	42.9
5. Track	9.5	45.5
6. Other Sports	13.9	43.9

Enrollment records were maintained for a total of 36,365 men. The overall 5-year graduation rate for all men in the study was 42.4%, which compares very favorably with previous research. A total of 52.0% of the male athletes from these same 46 colleges had graduated at the end of the 5-year period. On the other hand, only 41.5% of the male non-athletes had graduated at the end of the 5-year period.

Although the overall graduation rates for athletes involved in football (42.9%) and basketball (41.9%) were somewhat less than other sports, the 5-year graduation rates for men in these sports were comparable to other graduation rate studies reported in the professional literature.

The data in Table 7 reflect median college graduation rates for the 46 different colleges. The patterns are very similar to those found when the data were aggregated across colleges. In general, male athletes graduated at a rate equal to or higher than male non-athletes.

ACT Educational Programs and Services

Appendix A

April 1976

Name
Director of Athletics
College Name
Address
City, State xxxxx

Dear _____:

The National Collegiate Athletic Association is interested in learning more about the academic progress made by varsity athletes on scholarship who first enrolled in 1975-76 compared with other male students. We have been asked to collect and report, in summary form, information on the above mentioned students after five years (Summer 1980). We would like for your institution to be included in the survey.

Throughout the study we will be very careful to maintain the confidentiality of the information provided by your office to us. We will ask you to maintain the educational major and enrollment status of each male student.

Please complete the enclosed Survey Participation Form and return it to me. If you agree to participate, I will write you again in May to outline in more detail the few pieces of information that you will need to maintain on the students mentioned above for the survey. We hope you will be part of this important survey.

Sincerely,

James Maxey, Assistant Vice President
and Director of Research Services
Research and Development Division

JM/cd

cc:

Enclosure

National Office
2201 North Dodge Street
P.O. Box 168
Iowa City, Iowa 52243
Telephone (319) 337-1000

THE AMERICAN COLLEGE TESTING PROGRAM

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Appendix B

MEMORANDUM

TO: Directors of Athletics of Member Institutions.

SUBJECT: Student-Athlete Graduation Survey.

You may recall the Executive Committee contracted with the American College Testing Program to conduct in 1974-75 a survey of the entire NCAA membership to determine the percentage of lettermen who earn undergraduate degrees compared to other males in the student body.

Although the survey indicated lettermen graduate at a higher rate than other males, the limited response from the membership (about 25 percent) permitted ACT only to draw tentative conclusions from the available data.

The Executive Committee, upon the recommendation of the Public Relations Committee, has authorized ACT to conduct a second survey to determine the percentage of ATHLETES who earn degrees in comparison to other males in the student body.

ACT will select at random 200 members to participate in the survey, and, hopefully, the refinement of the questionnaire and the request in advance for the institution to maintain records for the next five years on all students and athletes who entered college in the 1975-76 academic year will enable each selected institution to participate fully in this important study.

All data will remain in the confidential files of ACT. The NCAA national headquarters will receive only the combined totals for all responses and an alphabetical listing of participating institutions without any institutional information.

The NCAA Council also heartily endorses this effort to obtain a conclusive report on this important question from this independent research organization, and we encourage you to do your part to make this survey a success.

JOHN A. FUZAK
President

JAF:ln

ACT Educational Programs and Services

Appendix C

June 1976

Name
Director of Athletics
College Name
Address
City, State xxxxx

Dear _____:

Thank you for returning your Survey Participation Form indicating your willingness to participate in a National Collegiate Athletic Association (NCAA) five-year study of male athletes and regular male students who first enrolled at your institution in the Fall of 1975-76.

Enclosed in an instruction sheet and an initial survey form for you to complete. The instruction sheet outlines the two kinds of information you will need to retain and update over the five-year study. Please return the completed survey form to me by August 30, 1976.

Throughout the survey, ACT will be very careful to maintain the confidentiality of the information provided to us by your office.

We sincerely appreciate your cooperation on this important survey. If you have any questions or comments regarding the survey, please feel free to call me at 319/356-3866.

Sincerely,

James Maxey, Assistant Vice President
and Director of Research Services
Research and Development Division

JM/cd

cc: Dave Cawood, NCAA

Enclosures

National Office
2201 North Dodge Street
P.O. Box 168
Iowa City, Iowa 52243
Telephone: (319) 356-3800

THE AMERICAN COLLEGE TESTING PROGRAM

Appendix D

NCAA 5-Year Study
of Male Graduation Rates

PROCEDURES

The two kinds of information you will need to retain and update for each of your male students (athletes and nonathletes) who first enrolled in the Fall of 1975-76 are listed below.

A. Enrollment Status. This will be a record of the enrollment status of each male student over the five-year study (academic level, transfer, drop-out, graduation date).

B. Educational Major. Note any changes in the educational major over the five-year study; the date of the change and the new major.

The first step for this five-year study will be the most time consuming. For your convenience we have enclosed a form for you to use to provide us with the appropriate information for your 1975-76 male freshman students. Each year thereafter, ACT will send to your office a computerized roster of the student names (similar to the printed form enclosed) for you to update the enrollment status and educational major.

Completing the Form

1. Student Name - List the name of each male student who first enrolled as a freshman (athlete and nonathlete) in the Fall of 1975-76.

2. Social Security Number - List the social security number or student ID number.

3. Athletic Information - List the sport each athlete participates in and whether or not he is on a scholarship.

4. Education Major - List first educational major. If the student changes his major at anytime during the five-year study, list the new major and the date of change.

5. Enrollment Status - List the enrollment status at the end of the given academic year (academic level, transfer, drop-out, etc.).

If you have any questions regarding this survey, please call or write Dr. James Maxey, American College Testing Program, P.O. Box 168, Iowa City, Iowa 52240, 319/356-3866.

College Name_____

City/State_____

NCAA 5-Year Study
of Male Graduation Rates

Student Name	Social Security Number	Educational Major	Athletic Information			Enrollment Status End of 1975-76 Academic Year
			Sport	Scholarship Yes	Scholarship No	

Appendix F

ACT Educational Programs and Services

Code:

Date

Name
Title
College Name
Address
City, State xxxxx

Dear _____:

A year ago we sent you a copy of the enclosed roster of men who first matriculated at your institution in the Fall of 1975. You will recall that your institution is one of 50 colleges and universities in the United States that agreed to participate in a 5-year study of graduation rates of male athletes as well as regular male students. The study is being sponsored by the National Collegiate Athletic Association (NCAA).

Please update the enrollment status, educational major, sport and scholarship indicated for the men listed on the enclosed roster for Fall 1977 and Fall 1978. (If you have already completed Fall 1977, just complete Fall 1978.) As I have indicated in the past, we will process the information with extreme caution in order to protect the privacy of individual students and institutions.

We appreciate your help with this important survey. Call me collect at 319/356-3866 if you have any questions about completing the rosters. I would like to be able to have the completed materials by November 30.

Sincerely,

James Maxey, Assistant Vice President
and Director of Institutional Services
Research and Development Division

JM:mh

Enclosures

National Office
2201 North Dodge Street
P.O. Box 168
Iowa City, Iowa 52243
Telephone (319) 337-1000

THE AMERICAN COLLEGE TESTING PROGRAM

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Senator SPECTOR. Thank you very much, ladies and gentlemen. The hearing is adjourned.

[Whereupon, at 12:50 p.m., the committee was adjourned.]

THE COLLEGIATE STUDENT-ATHLETE PROTECTION ACT OF 1983

MONDAY, MAY 23, 1983

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, in room 226, Dirksen Senate Office Building, commencing at 10 a.m., the Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senator Specter.

Staff present: W. Stephen Cannon, chief antitrust counsel; Sally Rogers, antitrust counsel; Debbie Shupe, research/investigator, committee staff; and Stephen P. Johnson counsel, Subcommittee on Juvenile Justice.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The Committee will come to order.

Today, the committee continues its consideration of S. 610, the Collegiate Student-Athlete Protection Act of 1983. The issue of whether the antitrust laws should apply to professional sports league eligibility requirements raises many major policy questions. Thus far, it appears that the signing of Hershel Walker by the New Jersey Generals of the U.S. Football League has not led to the predicted exodus of college athletes into professional sports leagues. However, the future remains unclear, and we intend to examine the provisions of S. 610 very thoroughly.

We are fortunate to have among our witnesses today representatives of both football leagues, the National Hockey League, and others who will address the concerns of players and colleges. I am sure that the testimony given by these witnesses will be most informative, and I look forward to hearing them.

The distinguished Senator from Pennsylvania has a statement.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. Thank you, Mr. Chairman.

At the outset, I would like to commend the chairman, the senior Senator from South Carolina, for convening these hearings on this important subject.

In March of this year Herschel Walker left the University of Georgia, in the middle of his junior year, to play professional football in the U.S. Football League. That occurrence shattered long-standing rules governing the recruitment of college players by professional teams.

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In explaining the USFL's decision to sign this undergraduate player, Commissioner Simmons stated to the press that the league rule, which had theretofore limited the recruitment of college players, violated the antitrust laws of the United States.

The Walker situation seemed to me and others in the Senate to be a dangerous precedent which had serious overtones. Accordingly, I introduced the Collegiate Student-Athlete Protection Act of 1983 which, if enacted, would insure that the antitrust laws do not prohibit professional sports leagues from establishing rules which prohibit the recruitment of college athletes who have not completed their education or eligibility. Last Wednesday, May 18, Congressmen Barnard of Georgia and McCurdy of Oklahoma introduced the same bill in the House, designated H.R. 3040.

This bill does not require any sports league to have such a rule, and in fact we do not contemplate that many such rules will be passed by the leagues if this proposal is enacted and the threat of antitrust litigation or prosecution is lifted. The sole purpose of this bill is to insure that leagues like the USFL and the NFL, which have chosen to voluntarily limit their own recruitment of college athletes, retain the right to do so without regulation or without the fear of violation of the antitrust laws.

There is substantial public interest in promoting policies which encourage student athletes to finish college and obtain an education. It goes without saying that an education is a valuable commodity, a veritable insurance policy for college athletes whose statistical chances of making it big in professional sports are slim indeed. There are all too many examples of college athletes, lured by the big bucks of professional athletics to leave school, who later sustain injuries and spend the rest of their lives regretting their decision to enter professional athletics early.

I do not deny that such legislation raises serious questions concerning the undeniable right of young adults to make employment decisions for themselves, indeed to leave school to take advantage of very lucrative offers of employment. Given the limited duration of a professional career, and the possibility of a collegiate injury which could preclude later professional employment, there is substantial validity to the argument that college players should be free to seek such contracts before finishing their education or eligibility. Commentators have also suggested that the professional leagues use college football as a minor league system, which enables the leagues and the colleges to reap big profits at the expense of the collegian.

These are serious and complex issues. It seemed to me and to others that there ought to be a full exploration of them before the Senate Judiciary Committee, which is the logical body to consider the ramifications of this rule. There is considerable value in permitting young college athletes to do as they please with their professional careers, and there is always a danger in seeking to modify the antitrust laws. However, when the balance which existed between college football and the professional leagues for so many years is shifted, it was our thought that this matter ought to be fully explored to see what the ramifications might be. As the chairman has noted, the signing of Herschel Walker has not been followed by the signing of other players. It was characterized by coun-

sel for the USFL at our first hearing as an isolated event, which the USFL did not intend to repeat. At that hearing we first heard from coach Joe Paterno of Penn State, and Bo Schembechler of the University of Michigan who testified very much in favor of the bill.

We have with us today a very distinguished array of witnesses to shed further light on this important subject.

Thank you very much, Mr. Chairman.

The CHAIRMAN. We have some very distinguished and prominent witnesses here today.

I believe our first witness is Mr. Chet Simmons, commissioner, U.S. Football League.

Mr. Simmons, if you will come around. You may proceed with your testimony.

STATEMENT OF CHET SIMMONS, COMMISSIONER, U.S. FOOTBALL LEAGUE

Mr. SIMMONS. Mr. Chairman, members of the committee, on behalf of the U.S. Football League, I thank you for providing us with an opportunity to testify on S. 610, the Collegiate Student-Athlete Protection Act of 1983.

The goal of insuring that student athletes complete their undergraduate education is one which the U.S. Football League shares and we applaud your efforts through the introduction of S. 610 and these hearings to examine the problems associated with achieving that goal.

The USFL encourages its players to complete their degree program by awarding additional compensation to a player obtaining his undergraduate degree. Currently, the USFL is the only professional league that has a specific contractual commitment to encourage degree completion by its athletes. The USFL player contract mandates that each player executing a contract at a time when he has not completed his degree will receive monetary compensation for completing his college degree. Therefore, by positive, affirmative action, the USFL is doing more than any other league to encourage the goal of education.

The league has also established a strict eligibility rule that:

> No person shall be eligible to play or be selected as a player unless: (1) all college football eligibility of such player has expired, or (2) at least five (5) years shall have elapsed since the player first entered or attended a recognized junior college, college or university or (3) such player receives a diploma from a recognized college or university.
>
> No player eligible for a Selection Meeting in any year may be signed by a club until the Selection Meeting in that year.

This rule however is generally thought by legal scholars to be unenforceable in certain situations. Its inflexibility or rigidity can operate to deny its effectiveness especially when applied to certain cases such as Willie Young or Herschel Walker. Accordingly, we are considering changes in our policy to accommodate those very limited situations where the refusal to sign a player would eliminate completely an individual's rights. We have encouraged the NCAA, the American Football Coaches Association, and the College Football Association also to examine their same policies in this area.

It is with these organizations the real issue of academic progress versus football eligibility lies. In fact, the USFL has referred one case to the CFA of a 24-year-old individual who has college football eligibility remaining but is now seeking to play professional football. Under the NFL and the USFL current eligibility rules, he may not play in either league. It is this type of situation, as well as the case involving the student athlete who has been declared academically ineligible that necessitates input from the appropriate organizations. I am hopeful that certain appropriate changes will permit the USFL to continue to support its policy of encouraging players to complete their education and at the same time protect the rights of athletes.

The league would urge that an appropriate balance be reached between the desire of the colleges versus the obvious rights of the individual student athlete. The eligibility rules currently in existence in both the USFL and the NFL are rules designed to discourage the signing of an individual student athlete until such time as his eligibility has been exhausted. The USFL certainly respects the value of a college education and believes a strong college football program is in the best interest of professional football.

However, it is impossible to ignore a young athlete's legal right to pursue employment and career opportunities just as any other individual enjoys the same right. The league is in favor of what we perceive to be the goal of the Senate bill 610. However, better alternatives may lie within the reach of the interested parties. The encouragement required to accomplish the desired goal of athletes completing their education must come through the cooperation of the NCAA, the College Football Coaches Association, and both professional football leagues and should not come at the expense of individual rights and opportunities.

But what is the real issue? Is it undergraduate education? If so, I believe our contractual obligations to support financially a diploma through incentives or scholarships and also our Project Sport, which is funded by the league and involves career and educational counseling, may meet the concerns. Or is the issue football eligibility and the protection of college football programs?

I applaud your goal which I understand is to encourage completion of undergraduate education and not how many downs can be played on the field for his college.

Then, we must balance individual rights against the college program. Perhaps a degree of academic progress should be included in the rules being discussed with the colleges and the coaches.

Thank you.

The CHAIRMAN. Thank you, Mr. Simmons.

Mr. Simmons, I have just a few questions I wish to propound to you.

During our previous hearing on S. 610, coach Joe Paterno of Penn State University discussed the many benefits that a student athlete derives from attendance at a college or university and implied that some compensation to the school for those benefits might be expected. Along those lines, it has been suggested that assuming academic eligibility requirements are met, the schools could protect themselves by entering into a long-term contract with the student athlete and Congress should not get involved.

Do you think that would be a viable option for the colleges to pursue?

Mr. SIMMONS. I think it is, Senator. Right now on the grant-in-aids and the scholarship program, they are done on a year-to-year basis and the student athlete does stand losing the chance of that support from the university. We believe this becomes a question between the athlete and the college and I think that should be looked at a bit more clearly than it has before.

The CHAIRMAN. Mr. Simmons, do you believe the leagues and the colleges rather than the athletes themselves should be responsible for determining whether it is in the athlete's best interest to remain in college?

Mr. SIMMONS. I think the athlete has to have a say in this. I looked at the past testimony and past hearing and there was only, one Willie Young, who was asked to come and put his statement in. I believe this is a question that perhaps should be asked of the student athlete, what is his desire, what are his goals, what are his focuses, where are his wishes. If he, in fact, wants to pursue a career in professional football and professional sports, for that matter, should not he have an opportunity to state his desires and plans?

LEGAL CHALLENGE OF RULE

The CHAIRMAN. Mr. Simmons, when Herschel Walker was signed by the New Jersey Generals, I believe you indicated that you did not believe the current eligibility requirements could withstand a legal challenge. Why do you think that the rules have not been challenged thus far?

Mr. SIMMONS. I think there have been instances, Senator, where the rules have been challenged. I think it is, No. 1, a very expensive circumstance, and it is a very, very long-and drawn-out procedure. We do not have a union, nor do we have a collective-bargaining agreement with a union that might cover a 4-year eligibility program. There have been scholars, and there are two law professors in Detroit who are about to put a paper out, who told us that they firmly believe if we try to defend our eligibility rule in the Walker situation, we would have lost that challenge hands down. It might have taken a longer time in the NFL because of their collective bargaining situation.

But in view of the quality of this young man, both as a football player and as a person, and the challenge we faced, we felt that at that point attempting to defend our eligibility rule would have been indefensible. If we had defended it and lost, then it would have opened the gate even more so to every young man in college right now that would want to come out and play professional football.

The CHAIRMAN. The distinguished Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

Commissioner Simmons, in earlier testimony at the first hearing on this bill, counsel for the USFL suggested that the Walker signing was one of a kind, and that the league did not intend to permit the signing of other collegians.

Is that the intent of the U.S. Football League?

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Mr. SIMMONS. I believe, Sen[illegible] that the Walker situation at the time was one of its kind. It was an extraordinary circumstance for an extraordinary young man. I doubt that any expert could have testified that this young man was not prepared in every way, emotionally, physically, creatively to play professional football.

Senator SPECTER. Commissioner Simmons, it has been said that Herschel Walker was signed because of his lawyer's threat to sue the league because of its rule not to sign college players. If the leagues consider the rule to be a violation of the antitrust laws, why then are not other collegians similarly situated? Should they have the same opportunity to sign early if they choose to do so?

Mr. SIMMONS. Senator, it was said at the time that if we signed Walker, that would open a floodgate of our going into the college ranks to sign underclassmen. That has not happened. It was said because of the fact that we were a new league and we were fragile, we needed the hype of Herschel Walker. That has not happened.

SIGNING WAS BOOST FOR USFL

Senator SPECTER. When you talk about the hype that accompanied the Herschel Walker signing, are you suggesting that there was in fact substantial hype in signing Herschel Walker?

Mr. SIMMONS. In the press it was certainly hyped. We went about our business, signed the young man for the reasons put forth before. It was certainly noted extensively throughout the country that we signed Herschel Walker.

Senator SPECTER. The signing gave the USFL a big boost at its inception. The reason advanced by the USFL at the time Walker was signed was that you had no alternative but to sign him, because if you refused to do so, and it had been challenged, you would have lost in court.

Mr. SIMMONS. That is correct.

Senator SPECTER. Then the issue then is, did you just use that situation as an excuse for signing Walker, or were you sincerely concerned that your failure to sign Walker was going to subject you to a losing lawsuit?

Mr. SIMMONS. That is correct.

Senator SPECTER. Everything is correct?

Mr. SIMMONS. Everything is correct—the second part is correct. It was the challenge of the lawsuit, but we have gone beyond that, Senator. We have addressed this question of future signings to the three bodies that I mentioned in my statement, the NCAA, the CFA, and the college football coaches. We recognize that we have a very, very rigid rule on both sides. It is black and white. You can play or you cannot play. There is no in between. We addressed this issue with this group, I believe my counsel's testimony in your first hearing discussed the meeting with this group in Dallas.

There are areas that I think that we must examine. The 24-year-old player that has no other opportunity—if he waits any longer his opportunity to play professional football would have gone by him. You have heard the statement of Willie Young. We have the question of scholastic ineligibility where a young man cannot get back into school because he is scholastically ineligible. We believe

there are procedures, and thoughtful modifications that can be made in the existing eligibility rules on the side of the colleges and the coaches and also on the side of professional football that can address better the rights of young people to come out and earn a living.

Senator SPECTER. Mr. Simmons, isn't it true that Willie Young sought to sign with the Chicago Blitz of the USFL?

Mr. SIMMONS. That is correct.

Senator SPECTER. And that you turned him down?

Mr. SIMMONS. That is correct.

Senator SPECTER. The law didn't change between the efforts of Willie Young to sign and the efforts of Herschel Walker to sign, did it?

Mr. SIMMONS. Senator, I believe that occurred in September or October—the league had been formed in May just a year ago. I became commissioner in late June or early July. This came on the heels of trying to organize a league where I was the only person employed by the league at that time.

Senator SPECTER. Are you saying it was a mistake not to sign Willie Young?

Mr. SIMMONS. If I had the opportunity to do that again with thoughtfulness, I would have permitted the Chicago Blitz to sign him. I would have approved his contract.

Senator SPECTER. Aren't there many college players who have contacted USFL teams through attorneys or agents, who have indicated an interest in signing with the USFL even though they were still eligible to play college ball?

Mr. SIMMONS. There have been. But what we have done is we have stopped in the effort that I described before in order that we might deal with the NCAA and the other bodies to see if we can together find the modifications that we could put into our eligibility rules.

Senator SPECTER. But is that consistent with your statement that you went ahead and signed Walker because you did not want to lose in court? Any other collegian that had signed a contract would have had the same potential to beat you in court.

Mr. SIMMONS. That is correct. But this was the one challenge that was placed in front of us, Senator.

Senator SPECTER. What do you mean, the one challenge that was placed in front of you?

Mr. SIMMONS. The brief that was submitted by Walker's representatives——

Senator SPECTER. But every other collegian who has shown an interest in wanting to sign with the USFL poses the same legal threat that Walker did.

Mr. SIMMONS. That is correct.

Senator SPECTER. Well, Commissioner Simmons, the problem I have with the league's position, bluntly stated, is that there is an apparent lack of sincerity on the league's part. Is it truly concerned about losing the case in court, because there is nothing different in the three cases of Willie Young, Herschel Walker, and some other collegian who is at this very minute trying to sign with the USFL. I am told that there are many, many who want to do so. Willie Young could have taken you to court, and the current colle-

gians could take you to court and Herschel Walker threatened to take you to court. There is a real question whether any of the athletes will in fact go to court, because of the difficulty it will pose for them of protracted litigation, and the difficulty it would create for their professional career afterwards, even if they were successful.

So Walker may never have taken you to court, but you signed him in the context of just starting a new league, and perhaps from a business point of view it was totally justifiable. It might have been a very good business decision. But it raises a fundamental question as to the sincerity of the league in signing Walker, and not signing others that want to be signed at the present time.

Mr. SIMMONS. If we can call what we are in the midst of, Senator, a moratorium, until we are able, and I do hate to be repetitious here, to deal with the appropriate scholastic and collegiate bodies, to find ways to deal with specific sorts of circumstances.

We must deal with the NCAA and the CFA and the college football coaches and come up with a set of circumstances and guidelines, a review procedure. Herschel Walker, and let us leave the name at Herschel Walker in this instance, decided as a young man, having won the Heisman Trophy, having been part of a national championship team, having been quoted by every college football coach and expert as a young man prepared to play professional football, wanted to play and wanted to come out and be a professional. If we had a review procedure, both in athletic and scholastic, a review procedure through his coach, through coaches from another school and through an academicians who could academically and athletically sit and talk to this young man, and counsel the young man on whether he was truly ready to come out and the coach or coaches and the academicians, agreed this junior absolutely is ready to come out. If all these reviews had been gone through and they said to the young man and counseled him, yes, young man, you are ready to play, then it may be fair to conclude that the athlete is ready. The same thing is done in professional basketball, a counseling procedure, a coach puts his arm around a young man who decides to come out and take his chances in professional basketball.

But on the other hand, if this review procedure says to the young man, you are not athletically ready, you are not emotionally ready, you are not scholastically ready, you are all the other things that say you are not ready. Do I now have a reason to prevent the young man from coming into the league? We are not the sole determining force.

Senator SPECTER. Commissioner Simmons, it has been reported to us that discussions with you and Mr. Charles MacClelland gave rise to Mr. MacClelland's statement, "The Walker incident is behind us and is now a dead issue."

The question is what assurances, if any, did you or any other representative of the USFL give Mr. MacClelland to receive that kind of a statement from him?

Mr. SIMMONS. At that meeting, coach MacClelland, who is the executive director of the College Football Association, and there were other parties in attendance—the NCAA college pro representatives and their chairman, Wyles Hellick, the outgoing chairman of the

PAC 10 Association, and there were two coaches in the room—and what we said was we wanted to sit down and form the committee that would deal with the subjects that I just talked about. In fact, Commissioner Hellick took on the job of chairing that committee. Because they also realized that these other issues must be addressed, the issue of hardship, if that is the word to be used, the issue of academic ineligibility, the issue of age, the issue of really being ready to play and, of course, the issue of a young man's right to go out and into the world and earn his livelihood.

We invited at that point the NFL to join us in those meetings. We have never had a meeting.

Senator SPECTER. So did you say in effect to Mr. MacClelland that you would not sign any more players until you——

Mr. SIMMONS. We wanted to sit down and we have not signed any undergraduate players, we have not signed a one.

Senator SPECTER. So there is now a moratorium or an agreement not to sign college players?

Mr. SIMMONS. Until we find a way to give thoughtful input, to go beyond the rigidity of the eligibility rules that exist on both sides of the table.

Senator SPECTER. Would you like to see S. 610 enacted so that the antitrust laws would not be violated if you stuck to the rule?

Mr. SIMMONS. We are in favor of S. 610, yes, sir.

Senator SPECTER. Thank you very much, Mr. Chairman.

Thank you, Mr. Simmons.

The CHAIRMAN. Thank you, Mr. Simmons.

Our next witness is Mr. Pete Rozelle, the commissioner of the National Football League.

Is he in the room?

Well, Mr. Rozelle, we are glad to have you with us. Come around and proceed.

STATEMENT OF PETE ROZELLE, COMMISSIONER, NATIONAL FOOTBALL LEAGUE

Mr. ROZELLE. I have with me Mr. Jan Van Duser, who is the NFL's director of operations and the staff member most familiar with our past draft practices.

The CHAIRMAN. We are pleased to have you with us too, along with Mr. Rozelle.

Mr. Rozelle, you may proceed with your statement.

Mr. ROZELLE. Mr. Chairman, I appreciate this opportunity to discuss the subject of the selection of undergraduates for employment in professional football. I want to thank the members of the committee for their interest in this subject.

The position of the National Football League on S. 610—H.R. 3040 in the House—is quite simple: Such legislation serves the interests of the colleges and universities, the public, and players generally. It has minimal relationship to the interests of the NFL, enabling us to continue a policy that maintains good relations with the collegiate game and its supporters.

We believe the NFL's policy on undergraduate players is both reasonable and proper in the circumstances of professional football. I am not here to seek special privileges or antitrust immunity for

the NFL. The simple fact is that the NFL's interests would be largely unaffected if we were required or ordered to draft and sign undergraduate athletes.

Presently, college players are eligible for employment by NFL clubs only when they have graduated, when they have completed their undergraduate eligibility through participation in football, or when 5 years have elapsed from the entry of their class into college. That policy dates back half a century. It was established at the instance of the colleges and universities, not the NFL clubs. In earlier decades—during the 1940's and 1950's, for example—there were many occasions when the League might have received a much-needed boost by the early signing of outstanding collegiate players prior to their graduation. But we have adhered to our policy for reasons beyond NFL self-interest that we believe are sound.

The League has stood by its eligibility principles because it has been urged to do so by the colleges and universities—who have the most to lose; because we believe the policy is sensible and fair; and because many in Congress have indicated their approval of our policy. In 1965, for example, in response to the urging of then Members of this Committee, we formally pledged that no NFL member club would sign any college player until after completion of all of a player's collegiate eligibility, and we continue today to respect that commitment.

As the Committee knows, the College Football Association—representing 60 major universities—has now reiterated its support for the NFL's eligibility policy. If Congress or the courts direct us to abandon our eligibility practices, we will do so. But we are not now prepared to alter our longstanding eligibility principles simply because another football league has done so.

The NFL's policy is not designed to advance financial interests of the League. The policy is not directed at preserving a free "farm system." If we are required to permit our clubs to raid college campuses for sophomore and junior football players, we would simply make the ordinary player selection procedures applicable to those players. Such a course will not impose any additional burdens—cost or otherwise—on the NFL. But the overall effects of such changed League practices will, in our judgment, be more negative than positive.

Mr. Chairman, the reality is that an elimination of the eligibility principle and the nullification of the amateur status of undergraduates would be counterproductive. A limited number of college football players eventually succeed in the pros. For every John Elway or Herschel Walker there are literally hundreds of college football players who aspire to play professional football but who do not succeed and have to find another occupation. Encouraging the signing of undergraduates will inevitably result in many players overestimating their abilities, prematurely leaving college to pursue a professional career, and proving unable to do so. The ultimate losers will be those undergraduates who will have sacrificed the opportunity for education, personal development, and football maturity provided by a college experience.

Before I conclude, I should repeat one point: This is not legislation designed to aid the NFL. The interests served by our current

policies are general and public interests. In that light, we are ready to assist the Committee in its inquiry, and I will be pleased to begin by answering any questions you may have.

The CHAIRMAN. Mr. Rozelle, earlier I asked Commissioner Simmons to discuss the possibility of using long-term contracts with student athletes to assure that each athlete remains in college as long as academic requirements are met. Do you believe that is a viable option for the colleges to pursue?

Mr. ROZELLE. I really would not know. I think that is up to the colleges who I think are represented here today to answer. I do not know if it would be viable or not, or whether it would be legally possible or not. I think that would be up to them to say.

The CHAIRMAN. In your statement I believe you suggested that any legislation should be mandatory rather than permissive. Why do you believe that simply allowing the Leagues to set up eligibility requirements rather than requiring that they do so is unworkable?

Mr. ROZELLE. Basically, the National Football League has had these eligibility rules for half a century. They are, however, modified. They are not rigid. I would like Mr. Van Duser to give you an illustration of the fact that we do not hold to the letter of these rules in special instances.

Mr. VAN DUSER. Senator, we have approximately 20 to 30 requests every year, either by phone or in writing for special eligibility. Sometimes these are reduced to special eligibility forms that we have developed. And I would guess that in the last several years, we have had approximately 10 to 12 of these special petitions that come to this formal status and we grant more than we deny and they are usually cases very much like Willie Young is. They are a mix of circumstances having to do with a player's age, military service, his separation from college for a number of years, academic status, personal problems. They are not, however, people who have come directly from a college football program, who can show no special circumstances that are privation or hardship. We do not have a hardship rule per se but we do make exceptions and have been making exceptions for years.

The CHAIRMAN. Mr. Rozelle, considering the fact that you feel a permissive legislative approach would cause problems, why do you think that a better approach would be to let the colleges and universities formulate their own standards? Would you agree that this could arguably lead to diverse and confusing standards among the different schools?

Mr. ROZELLE. We simply felt that it was not something that we were seeking so that it would be better placed on them rather than on the professional football leagues.

The CHAIRMAN. The distinguished Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

Commissioner Rozelle, there is a lot of speculation as to what is going to happen on this issue. It has been written about in the sports pages. The initial thought after Herschel Walker was going to sign was, that the USFL was going to go out in a big way to sign college players, created quite a lot of hullabaloo. Concern was expressed in the Congress about it and the USFL pulled back and did an abrupt about face on what was expected using the Walker incident as a guidepost. But if the USFL were to go into recruiting of

sophomores and juniors and if the league were not to succeed as it apparently is doing at the present time, and felt it necessary to go after Marcus Dupre and other collegians so that their efforts brought them a great many of the big college stars could the National Football League just sit back and continue to observe the rules that you have discussed, if there were a real exodus of the cream of the crop to the USFL, which might give them preeminence in the professional football area shortly.

Mr. ROZELLE. I would hope we could hold to our half century policy. We had a similar involvement with Herschel Walker that Mr. Simmons spoke about, that the U.S. Football League had. Walker's attorneys visited us at the conclusion of his sophomore year and made it very clear that he was considering litigation and that the chances of succeeding he felt were quite favorable. We said we will take the suit in order to hold to this policy.

Senator SPECTER. Are you suggesting that the NFL is not afraid of litigation?

Mr. ROZELLE. Just a little leery of it.

Senator SPECTER. You have had your share.

Mr. ROZELLE. We said in that case we would take the suit—that we have committed to the Congress and the colleges and we would hold to it and we were prepared to take the litigation from them.

Senator SPECTER. Do you think that if the USFL had been as steadfast and tenacious as the NFL, that Herschel Walker would not have sued them as he did not sue you?

Mr. ROZELLE. Yes.

Senator SPECTER. I interrupted you in mid-sentence. But what is the following line? What if USFL really went out and recruited in a big way and started taking all the potential All Americans?

Mr. ROZELLE. It would create a situation for the National Football League, if all of the name players were going into another league, that would cause pressures to change our policy. But I think the much more likely alternative than the NFL changing its policy voluntarily would be through a litigation route, through an agent testing the rules. In other words, we would make every effort, regardless of the circumstances, to hold to our policy with the colleges, even though the USFL was signing some of the players.

Senator SPECTER. But your litigation practices would not stop the USFL, if they went out and signed 60 of the top college players. There is nothing you could do about that through litigation.

Mr. ROZELLE. It would create considerable pressure on us but, again, I want to repeat it, we would still attempt to hold to our rule. But the more likely instance, Senator, is that with some 200 agents floating around, that they would be the ones to commence a suit because it would be more money for them and they would be the ones that would want to induce the college players to sign so they could get a percentage of their bonuses and their contracts. They would have a strong inducement for litigation and the outcome of litigation, as was suggested by Mr. Simmons, could be questionable. We are not certain. We might lose it.

Senator SPECTER. But if you are saying that the agents might want to litigate, why would they choose to litigate with the NFL and enduring that protracted process when they could go across

the street to the USFL and maybe take a little less money but still substantial salaries and then the NFL would be faced with the situation where they would be left behind?

Mr. ROZELLE. Because the agents represent a number of players this year, next year, 5 years from now. So they would like to set up a situation to insure competition between the two leagues in signing players, to insure a greater salary and bonus, rather than having just the U.S. Football League to deal with.

Senator SPECTER. By that logic, they are pleased to wait out the present system until eligibility is up and then have the competition between the two leagues.

Mr. ROZELLE. Unless the U.S. Football League continued to take the cream of the crop early.

Senator SPECTER. That is the alternative that I am posing. Even if the agents would like to hold back, if the USFL goes out and in an aggressive way makes offers, those agents could not ignore them or they will find themselves out of work. They will not be representing those football stars.

It just makes me wonder if the judgment is not a business judgment. The USFL goes after Herschel Walker because it is good business to do so. And now they are not going after other collegians because it is not good business. But if their fortunes slip and they decide to go out and recruit 60 of the top collegians, they might decide to do so stating the antitrust violations. It seems to me you would be hard pressed not to do it.

Mr. ROZELLE. I acknowledge we would be. But we will make every effort to hold to our principle. Herschel Walker was only signed 5 months ago. There has not been enough time elapsed to see what the effect of that signing will be. If other name players go to the U.S. Football League and say or, more likely, have their agents say, "this boy is ready for football, he has the physical ability of Herschel Walker, and we are going to sue if you do not let him in," there would be a problem. The basic situation in football is that apparently in 1983, this season, there will be 44 professional football teams, 28 in the NFL and 16 in the U.S. Football League. Each of those 44 teams will have a player limit of some 40 to 49. They will have starting roles, unlike other sports, for at least 24 players, the two platoons, 11 on each, for 22, and 2 kickers, a punter and a place kicker. That is a tremendous number of job opportunities and you are going to have agents convincing players that they will have an opportunity to get one of those many places and get the money now if they will sign with the agent—the very act of which, as I understand it, makes the player ineligible for the NCAA. And I think that you are going to have many players that would not be physically or mentally mature enough for professional football.

Your State is an example. That had the young man who at the end of his freshman year had gained over 1,000 yards. He was a big national name, Tony Dorsett. Tony Dorsett, at the end of his freshmen year weighed only 158 to 160, much less than when he graduated from Pittsburgh. If you have an agent going to him and establishing a case that we can get this for you now, if you come into pro football, I think Tony would have had a much more difficult

time and perhaps been injured and not had the great career he has had with the Dallas Cowboys:

Senator SPECTER. Commissioner, when we had the hearings earlier, testimony was adduced that the USFL had secured opinions of two outside counsel that the rule prohibiting recruiting of college players violated the antitrust laws, and Herschel Walker's lawyer, according to the information submitted to us, had submitted testimony for a legal opinion that the rule violated the antitrust laws.

Do you believe that the rule violates the antitrust laws where the leagues are not willing to negotiate or enter into contracts with any collegian that wants to sign?

Mr. ROZELLE. I am sure you can find an attorney that will tell you so. That depends on the outcome of the court case. As we know, court cases can go either way. Certainly you will find attorneys that will tell you it does. I imagine the antitrust laws, plus the labor laws, in other words, what language you have in your collective bargaining——

Senator SPECTER. Considering the fact that you can find professionals that will tell you anything, have you found attorneys that have told you that the rules have not violated the antitrust laws?

Mr. ROZELLE. They have told us that, one, in part it depends on the labor laws, in other words, the collective bargaining agreement that we have signed with the union; two, they said it would depend on the basketball case, the *Spencer Haywood* case that went the way you are suggesting, against the professional league but, again, I would say that it would be a court test. All these factors would be involved in it and you might well lose it, yes. I am conceding that. But you do not know until you test it.

Senator SPECTER. And in any event, your position is that you are willing to play out that string to preserve the rule and the balance which you find present today between the pros and the colleges?

Mr. ROZELLE. That would be our present intention and I would hope that we could hold to that. We have a number of reasons for wanting to. It has worked well for 50 years. It would not make any difference to the National Football League if we were to draft seniors or juniors or sophomores. We would just run them through the draft as is done in basketball. But we do not think it would be helpful. We do not think they would be ready physically or emotionally.

We want to cooperate with the colleges. Because of the problems they have with title 9, the football program carries the weight and we would like to work with them in ensuring that they can conduct their own program.

Senator SPECTER. If there are to be no more additional signings like Herschel Walker, you do not mind because the rule remains intact, whatever the law might be. But would you like to see S. 610 enacted?

Mr. ROZELLE. We do not seek it but we certainly support it because we do not think enough time has elapsed to show what would happen.

Senator SPECTER. You would not be totally adverse to relaxing the antitrust laws as they apply to professional football?

Mr. ROZELLE. Repeat.

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Senator SPECTER. You would not be totally adverse to relaxing the antitrust laws as they apply to professional football?

Mr. ROZELLE. Across the board or just involving eligibility?

Senator SPECTER. One step at a time.

Mr. ROZELLE. We support this legislation but we do not seek it.

Senator SPECTER. If Willie Young had come to the NFL or, perhaps I should back up and ask you, did Willie Young come to the NFL?

Mr. ROZELLE. He did not. I believe Mr. Van Duser can say if he had come because of his time away from college, it is likely that we would have approved him in the NFL.

Senator SPECTER. One final question, Commissioner Rozelle, which may be more legal than administrative, but you have had a lot of experience along these lines. Do you think the ruling of the Tenth Circuit Court of Appeals, which held that the University of Oklahoma and Georgia on their challenge to the NCAA's television pooling regulations violated the Sherman Act, has any implication for professional football?

Mr. ROZELLE. I am not certain yet. We did have a law passed in 1961 granting certain antitrust exemptions to professional sports and I think it is an interpretation but that law might cover the problem for us, although I would say it is a legal uncertainty at this time.

Incidentally, when that law was passed in 1961, certain concessions were built in for the colleges, recognizing congressional concern about professional football leagues taking players before they had graduated and that was a case of giving the colleges an assurance that the professional leagues would not televise professional football games during their season on Friday night or Saturday.

Senator SPECTER. Commissioner Rozelle, just one other question. It was asserted in our earlier hearings that college athletes have not challenged this rule, even though some say it is patently violative of the antitrust laws, because to do so would be to establish a legal precedent that would be harmful to their professional ties, and it would not be worth the while of the collegiate to challenge the rule. Do you think there is any validity in that kind of assertion?

Mr. ROZELLE. No, because I think it is very likely, if things continue the way they are that within the next few years, you will have an agent challenging the rule and on the basis of the basketball decision, he might get expedited treatment. Even if it takes time, he has established for future clients, not only the ones he is dealing with, the right to deal with them in the sophomore and junior years.

Senator SPECTER. And if some sophomore out of Oklahoma U beats the rule, the USFL might take him.

Mr. ROZELLE. A high school player?

Senator SPECTER. College player, University of Oklahoma was my hypothetical.

Mr. ROZELLE. Marcus Dupree. He was an outstanding freshman. We would not intend to take him at this point unless we are forced to by a bill from Congress or from the courts.

Senator SPECTER. But if he came in and challenged the law and came to the league, would he be welcomed with open arms or would he be considered a trouble maker?

Mr. ROZELLE. He would be welcomed. If the rules are changed, we will live with them, and with him.

Senator SPECTER. Thank you very much, Commissioner Rozelle. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Rozelle, let me ask you a very practical question. Suppose you got an 18- or 20-year-old or 22-year-old boy who is not academically inclined. He is not a scholar at all. Suppose he had not even finished high school or if he just finished high school only because he is an excellent football player and he would make an excellent player for one of the leagues. He cannot make it in college. Should he be denied the right of using his talents God gave him and did not give so many other people, to play football?

Mr. ROZELLE. I do not feel that would be the case. I signed such a player 25 years ago, when I was with the Los Angeles Rams, Eugene "Big Daddy" Lipscomb, who eventually went to the Baltimore Colts. He had graduated high school. He had been in the military. He was not academically equipped for college. So he was approved by the National Football League. The American Football League had "Cookie" Gilchrest. As Mr. Van Duser attempted to explain, we do grant concessions where it is feasible, where a boy starts college, goes away to the military for, say, two years, comes back, is not academically inclined to finish his college career. He could not get into school. We took him or gave him an opportunity to make the NFL.

The CHAIRMAN. Suppose he does not go away to the military. Suppose he has not even finished high school, but he is an outstanding, splendid football player and could make your team. Under your present rules, would he be allowed to play?

Mr. ROZELLE. Yes, he would be, but I think it is unlikely that you would have——

The CHAIRMAN. I am not saying it is unlikely. I am asking you whether he would be allowed to play.

Mr. ROZELLE. If he is not academically eligible for high school football——

The CHAIRMAN. I am not speaking about academics. Leave academics out of it. He is an excellent football player. The good Lord has endowed him with that talent. Outstanding football player. But he is not scholarly at all. Say he did not go beyond the 7th grade but he has a fine body. He has a good mind for football. He does not have it for Latin or history or mathematics or anything else, but he has it for football. Say he has not finished high school.

Would you accept him as a football player?

Mr. ROZELLE. He is still academically eligible at the high school?

The CHAIRMAN. I am not talking about academics. Say he has not gone beyond the sixth grade. Say he is a good boy. Say he did not go to school. Suppose he does not go to school at all, but here he pops up as good a football player as you can find in the United States, but he has not been in school.

Mr. ROZELLE. Yes, we would accept him.

The CHAIRMAN. Would you accept him?

Mr. ROZELLE. Yes.

The CHAIRMAN. Would your rules permit you to accept him?

Mr. ROZELLE. Yes.

The CHAIRMAN. Well, if you pass this bill here today, could you still accept him?

Mr. ROZELLE. A high school player?

The CHAIRMAN. If you pass the bill we have before us today, would that deny such a player the right to play, S. 610, or maybe your lawyer wants to answer that?

Mr. ROZELLE. We have Mr. Tagliabue who might want to answer that. It is a legal question.

The CHAIRMAN. I am a believer in education. I firmly believe in that. I put all my honoraria in education, have established some 30 scholarships. No one believes in education more than I do.

On the other hand, God has given different people different talents; and if he gives a young man a special talent in football but not in scholastics, the question in my mind is whether anybody should deny him that right to go and play professional football if he wants to do so.

Mr. ROZELLE. The facts as you outlined then would call for the National Football League to give him that opportunity.

The CHAIRMAN. Under your present rules, he could play?

Mr. ROZELLE. It has been done.

The CHAIRMAN. I am not asking you that. He could play?

Mr. ROZELLE. Yes.

The CHAIRMAN. If you passed this S. 610, could he still play?

Mr. ROZELLE. I would want a legal conclusion from Mr. Tagliabue.

The CHAIRMAN. What about your lawyer, would he care to venture an opinion on that?

Mr. VAN DUSER. I am not a lawyer.

The CHAIRMAN. Have you studied this bill enough to pass judgment on that? Is this bill going to keep any young man from playing football whether he has any scholastic records or not?

Mr. TAGLIABUE. Not the way I would read it. It would not keep this player from playing. It does not give you the authorization to exclude anyone from playing.

The CHAIRMAN. But the league would have to pass an eligibility rule under this bill for him to play?

Mr. TAGLIABUE. The League would want to have the same rules it has and it will continue to apply them in a sensible way.

The CHAIRMAN. Suppose it does not pass a rule on the eligibility rule. Then he would be denied the opportunity?

Mr. TAGLIABUE. If we had no eligibility—that bill does not require us to do anything. I think he could still play. We would have to have a rule and the rule would have to permit him to play, yes.

The CHAIRMAN. He would not be permitted to play unless you had a rule and suppose you could not get your rule passed?

Mr. TAGLIABUE. Under the bill, S. 610, if we had the same rules we have today, the player that you identified would be permitted to play, as the Commissioner said. There have been such players in the past and they have played.

The CHAIRMAN. What I am trying to find out is whether there are any rules now or whether this bill would provide any rule that

would prohibit a young man from playing football if he had a special talent in that regard and had no talent in scholastics.

Mr. ROZELLE. They have been taken in the past, as I explained. I gave you the instance of Gene Lipscomb.

The CHAIRMAN. I am not talking about the past. I am talking about the future.

Mr. ROZELLE. We would plan to continue making such exceptions in the future.

The CHAIRMAN. Would you make those exceptions?

Mr. ROZELLE. Certainly.

The CHAIRMAN. Can this young man be guaranteed of that?

Mr. ROZELLE. Certainly, we would make those exceptions.

The CHAIRMAN. It really makes no difference whether a young man goes to college or not. He can play football if he has the talent?

Mr. ROZELLE. He could. It would be a one in I do not know how many thousand shot of him making it.

The CHAIRMAN. That may be true. But don't you want to leave that opportunity open?

Mr. ROZELLE. Yes, we do. We do now and would in the future, unless we are precluded.

The CHAIRMAN. Now would this bill allow the league to pass a rule that prohibits him from playing?

Mr. ROZELLE. A legal conclusion.

Mr. TAGLIABUE. I think legally it would or could but we have no intention of doing that.

The CHAIRMAN. You might not, but what about your successors?

Mr. TAGLIABUE. This is one reason we suggested in the commissioner's statement that the authority should be given to the colleges and let them have the disretion.

The CHAIRMAN. Should they have the right to prohibit any young man from playing who did not go to college or did go to college? Who is going to regulate lives in this country? Is the individual going to have a right to go as high as he can, maintain freedom in this country, and let a man rise up high as he can, whatever occupation he wants to follow or is he going to be controlled by some rule in some league?

Mr. TAGLIABUE. All we are suggesting is there are important interests on both sides and the balance has to be struck. We have rules that require admission to the bar to practice law, that require one to complete law school. There are many, many rules in life that one has to pass and many to live with.

The CHAIRMAN. What rule has to be passed? If he has a lawyer, he has to pass that. If he is a doctor, he has to pass that.

Mr. TAGLIABUE. What we are trying to suggest is that there are different interests here and from the players' standpoint, and it could be counterproductive, in view of the pressures that exist, to eliminate the current principles we have. But we could make exceptions for the type of player you have identified who has no academic skills whatsoever.

The CHAIRMAN. But you have to take exceptions?

Mr. ROZELLE. Yes.

The CHAIRMAN. He does not have the right himself?

Mr. ROZELLE. That is correct.

The CHAIRMAN. You deny him that right?

Mr. ROZELLE. That is correct.

The CHAIRMAN. He is denied that right unless you make the exception?

Mr. ROZELLE. Under our eligibility rule, if we do not make an exception, then the player is required, in effect, to remain playing college football and continue his education, yes.

The CHAIRMAN. If the league did not pass the rule here that allows him to play, he could not play. In other words, you have the right to pass a rule to prohibit him from playing under this bill.

Mr. ROZELLE. Certain players, yes.

The CHAIRMAN. I am not talking about certain players. I am talking about any player.

Mr. ROZELLE. Under that bill, we could not be challenged under the antitrust laws, if we had rules that required players to complete their education, yes.

The CHAIRMAN. And therefore a young man's future, who might be a star athlete, not a scholar but an athlete, his future lies in the action of the league here, does it not?

Mr. ROZELLE. Yes, because——

The CHAIRMAN. And what action they take.

Mr. ROZELLE. Because you have all of the players playing football, and I am sure while in college that they all think they have the ability, the confidence to make it in the NFL. A very small percentage do. You can have them leaving college——.

The CHAIRMAN. Mr. Rozelle, I understand all that. I do not think you catch the point I am getting at. I am trying to establish here a right of any young man, if he is talented, if God gave him a special talent to play football, will he be allowed the opportunity to do so, whether he has been to college or has not been to college, and he would not be prohibited from that opportunity under your rules or anybody else's rules.

Mr. ROZELLE. On the first part of that question, that we discussed earlier, the high school player, we said, yes, an exception would be made if he is not going to make it academically.

Now the second part of your question refers to a player who is in college and the suggestion, I assume, is that regardless of his circumstances, if he is a freshman, a sophomore, a junior, or senior, at any period he has the right to come into professional football. I take it that is your question and the National Football League policy for 50 years is that he does not have that right until he completes his eligibility or 5 years have passed.

The CHAIRMAN. I will ask you this question again: Would this bill allow the league to pass a rule that would prohibit such a man as I described from playing?

Mr. ROZELLE. That is a legal question.

Mr. TAGLIABUE. Yes, I think it would.

The CHAIRMAN. You think it would; OK.

Thank you very much.

[Prepared statement of Pete Rozelle follows:]

PREPARED STATEMENT OF PETE ROZELLE

I appreciate this opportunity to discuss the subject of the selection of undergraduates for employment in professional football. I want to thank the members of the Committee for their interest in this subject.

The position of the National Football League on S. 610 and H.R. 3040 in the House of Representatives is quite simple: such legislation serves the interests of the colleges and universities, the public, and players generally. It has minimal relationship to the interests of the NFL, enabling us to continue a policy that maintains good relations with the collegiate game and its supporters.

We believe the NFL's policy on undergraduate players is both reasonable and proper in the circumstances of professional football. I am not here to seek any special statutory privileges or antitrust immunity for the National Football League. For the simple fact is that the NFL's interest would be largely unaffected if we were to determine to draft and sign undergraduate athletes.

The NFL cannot yet assess the severity of the threat to the educational and athletic programs of the colleges and universities posed by the early signing of undergraduate football players. When Senator Specter introduced S. 610, he noted that "the [Herschel] Walker case could lead to a stampede on recruiting of college players if the longstanding rules are not reinstated and preserved." Whether or not this will be so depends largely on the plans and actions of the USFL—which are at this stage ambiguous, so far as we can discern. While the USFL has not signed undergraduates other than Herschel Walker, we have noted predictions that the "Walker case will not be an isolated situation for long," as was stated on March 4, in a special USFL advertising supplement published in USA Today:

"Despite USFL Commissioner Chet Simmons' claims that the Walker case was an 'isolated situation' and that the rules governing the signing of undergraduates would remain intact, the barrier has been broken and there is little doubt that other talented collegians will travel the path that Herschel has blazed.

"For if the USFL felt that Walker would win his case if barred from his right to earn a living in his chosen profession, as it stated in a prepared statement released to the media, then how can any other collegian who wants to play professional football before his class graduates lose the same case? Surely the merits of the plaintiff's case would not hinge on the fact that the player in question isn't as talented as Herschel Walker. Every undergraduate, whether he be the Heisman Trophy winner from Georgia or a back-up quarterback from Oregon, has equal protection under the law. The precedent has been set. The door is now open for undergraduates to enter professional football. the Herschel Walker case will not be an isolated situation for long."

In our view, a key purpose of the Committee's hearings will be to enable the colleges and universities themselves—and the USFL—to furnish information to the Committee to assist it in assessing the severity of the current situation and the need for legislation on this subject.

Presently, college players are eligible for employment by NFL clubs only when they have graduated, or they have completed their undergraduate eligibility through participation in football, or when five years have elapsed from the entry of their class into college. That policy dates back a half a century and was established at the insistance of the colleges and universities, not the NFL clubs. The NFL has not always had the national following or the financial stability it has today. There were many times when the League might have received a much-needed boost by the early signing of players like Elroy Hirsch, Alan Ameche, O.J. Simpson or Earl Campbell prior to their graduation. But we have adhered to our policy for reasons beyond self-interest that we believe are sound.

The League has stood by its eligibility principles because it has been urged to do so by the colleges and universities—who have the most to lose; because we believe these principles are sensible and fair; and because many in Congress have indicated their approval of our policy. In 1964, for example, a report of this Committee took note of the colleges' concerns during the NFL-American Football League period about potential signings of players with college eligibility remaining, stating:

"An amendment was offered in the subcommittee to make it a violation of law for any professional team to negotiate with college students prior to the conclusion of the fourth academic year unless all sports in which such student has at any time engaged in intercollegiate competition shall be at an end.

"While the members do not condone raiding of college campuses by professional team representatives, the practices involved did not seem of sufficient magnitude to warrant congressional action. However, it is the intent of the subcommittee to

follow closely the actions of the leagues and clubs in this regard." S. Rep. No. 1303, 88th Cong., 2d Sess., at 7 (1964)

At that time, in response to the urging of Committee members, the NFL (and the AFL) pledged that no member club would sign any college player for professional play until after completion of all of a player's eligibility for collegiate play. (The pertinent correspondence with the late Senator Philip Hart, the then Chairman of this Committee's antitrust subcommittee, is attached to this statement.)

Currently, as the Committee knows, the College Football Association—representing sixty major universities—has reiterated its support for the NFL's eligibility policy in an earlier round of these hearings. The eligibility principles are now incorporated in the NFL's collective bargaining agreement. If Congress or the courts should direct us to abandon these eligibility practices, we will certainly comply with such a directive. But the NFL is not now prepared to alter its long-standing eligibility principles simply because another football league has elected to do so.

Contrary to certain suggestions, the NFL's policy is not designed to advance financial interests of the League. The policy is not directed at preserving a free "farm system" for the League. If the NFL is compelled to permit its clubs to raid college campuses for sophomore and junior football players, the League will simply make its ordinary player selection procedures applicable to those players. Such a course will not impose any additional burdens—cost or otherwise—on the NFL. But the effects of such changed League practices will, in our judgment, be more negative than positive.

The reality is that an elimination of the eligibility principle and the nullification of the amateur status of undergraduates would be counterproductive. A limited number of college football players eventually succeed in the pros—for every John Elway or Herschel Walker there are literally hundreds of college football players who aspire to play professional football but who do not succeed and have to find another occupation. The encouragement of the signing of undergraduates in football will inevitably result in many players overestimating their abilities, mistakenly leaving college to pursue a professional career, and proving unable to do so. In such circumstances, the ultimate losers will be those undergraduates who will have sacrificed the opportunity for education, personal development, and football maturity provided by a college experience. Any "benefits" even to those players who could succeed in starting their professional careers early will be marginal.

In considering the eligibility issue, it is also necessary to understand the facts concerning the length of playing careers in professional football. Undeserved significance is often attached to a supposed "average" playing career of NFL players of four and one-half or five years. But such "averages" have limited significance; they are basically attributable to the circumstance that a large number of players who attempt the professional game do not make it beyond a year or two. These are players who may survive their first-season "cut," or who manage to catch on with another team if they are "cut" but fail to prove after a season or two that they have the ability to succeed in the professional game. When these players are included in "average" figures, career expectancies appear short-lived. But the players who do establish themselves as NFL players commonly experience careers far in excess of five years—as a look at the active squads of practically any NFL team will demonstrate.

Critics of the NFL's policy sometimes assert that eligibility rules should not be followed because so few players earn college degrees. But a recent published report of a study by the American College Testing Program indicated that while 52 percent of student-athletes graduate within 5 years, only 41.5 percent of non-athletes do so. Such figures reflect many factors and are not the last word, and I personally wish that all students could earn their degrees. But the realities of college education, as reflected in this study, certainly do not suggest that student-athletes should forego their eligibility in the belief that their educational opportunity is far less meaningful to them than to students generally.

In receiving the present subject, the Committee will, we believe, come to recognize that the federal courts have not developed consistent or predictable standards in dealing with the antitrust aspects of player-employment issues. The appellate courts have, for example, generally applied a "rule of reason" standard, but the trial courts have often not done so. As another example, one federal court of appeals commented on the player structural issue as follows:

"Some leveling and balancing rules appear necessary to keep the various teams on a competitive basis without which public interest in any sport quickly fades. This, of course, is the crux of most of the past restrictive rules and those now in force. Professional sports are set up for the enjoyment of the paying customers and not solely for the benefit of the owners or the benefit of the players. Without public

support any professional sport would soon become unprofitable to the owners and the participants."

If this is a sound conclusion, there is no principled justification for ignoring these considerations—as some courts have done—in an antitrust "rule of reason" analysis of player employment practices.

Other antitrust decisions, including those concerning eligibility matters, have gone in many directions—often in contradictory fashion. As an example, one federal district court rejected a hockey league's eligibility rule against employing youthful players under the age of 20 as a "group boycott" and therefore a per se violation of the antitrust laws, while a federal appeals court has upheld a sports league's eligibility bar on employing one-eyed hockey players because such a prohibition was found to be not "materially anticompetitive." Neither court engaged in any full analysis under the "rule of reason." In other cases, courts have suggested that league practices condemned as per se violations can become lawful under the "rule of reason" depending on when they are imposed during a league's season and that unreasonable restraints on player employment can become lawful if they are made effective following a hearing.

Finally, we would offer two comments on the particular terms of possible legislation on the eligibility issue. First, any legislation should apply in an equal manner to all major leagues operating in a particular sport. S. 610 as drafted allows leagues to honor eligibility rules but does not require that they do so. Thus, it permits precisely the situation we have seen this spring, with two leagues in the same sport following different practices—in one instance different even from its announced practice—in dealing with undergraduate players. In short, if legislation is to set realistic ground rules for league operations, it should be mandatory rather than permissive.

Second, we believe the Committee should also consider Senator Heflin's suggestion that any antitrust exemption be granted to the colleges and universities rather than to the professional leagues. Under such an approach, the colleges and universities would be entitled to recommend or formulate standards or practices that serve the multiple interests affected by these matters. The NFL does not seek a specially legislated immunity for itself for the player-employment principle at issue here. But if other leagues question the legality of such rules and if the confusion in the courts is sufficient to persuade this Committee to support an antitrust exemption in this area, the exemption might most effectively be designed to insulate from antitrust challenge eligibility principles to be established at the collegiate level—and adhered to by the professional leagues on a common basis.

Mr. Chairman, in closing let me simply repeat one point: this is not legislation for the NFL. The interests served by our current policies are general and public interests. In that spirit, we stand ready to assist the Committee in whatever manner may be constructive.

PROFESSIONAL SPORTS ANTITRUST BILL–1965

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ANTITRUST AND MONOPOLY

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

EIGHTY-NINTH CONGRESS

FIRST SESSION

PURSUANT TO

S. Res. 40

ON

S. 950

A BILL TO MAKE THE ANTITRUST LAWS AND THE FEDERAL TRADE COMMISSION ACT APPLICABLE TO THE ORGANIZED PROFESSIONAL TEAM SPORTS OF BASEBALL, FOOTBALL, BASKETBALL, AND HOCKEY AND TO LIMIT APPLICABILITY OF SUCH LAWS SO AS TO EXEMPT CERTAIN ASPECTS OF THE ORGANIZED PROFESSIONAL TEAM SPORTS OF BASEBALL, FOOTBALL, BASKETBALL, AND HOCKEY, AND FOR OTHER PURPOSES

FEBRUARY 18, 19, 23, AND 24, 1965

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THE NATIONAL FOOTBALL LEAGUE,
New York, N.Y., April 9, 1965.

Senator PHILIP A. HART,
Chairman, Subcommittee on Antitrust and Monopoly,
Washington, D.C.

DEAR SENATOR HART: You have asked for a formal statement of the National Football League's views on S. 950. Enclosed is such statement. Because of the very complete record made at earlier hearings, the league has kept its statement quite brief.

In accordance with your suggestion, we have commented on both the Friday night telecast matter and the question of the signing of college players before their eligibility has expired.

The National Football League greatly appreciates your continuing interest in this bill.

Sincerely,

PETE ROZELLE, *Commissioner.*

STATEMENT OF PETE ROZELLE, COMMISSIONER, NATIONAL FOOTBALL LEAGUE

The National Football League strongly supports S. 950. It believes it to be in the interest of the league and of professional football, its fans, its players, and all those connected with it.

The reasons for this have been discussed at length at prior hearings. There is no need to repeat that testimony here. I would like simply to reaffirm some of the key considerations which make S. 950 an appropriate solution to a problem which clearly calls for legislative action.

There is first the unique relationship which exists among member clubs of a sports league. On the playing field, they are clearly competitors—and every effort must be made to preserve this relationship. But in most other areas of their operations, they are partners or joint venturers acting together in a common enterprise. There is nothing comparable to this relationship elsewhere on the American scene. It is simply not a relationship which ordinary antitrust principles were designed to accommodate. Because of it, the application of the antitrust laws to be basic patterns of professional sports tends to confuse and distort rather than contribute to the public interest.

A sports league is not a natural product. It is an artificial entity created and kept alive by elaborate rules of organization developed for that purpose. Most of these rules are directed at maintaining and improving the quality of the sports entertainment offered to the public. Most of these rules have a direct relationship to playing field performance and to fan interest. Yet there are those who would preserve the right to challenge under the antitrust laws the very rules of organization which make sports leagues possible—all because of per se and other antitrust concepts developed in entirely different fields of endeavor. There is simply no purpose in this.

There is also the anomaly of court decisions labeling one sport as fish and other sports as fowl for antitrust purposes. There is no logic behind this. The Supreme Court itself has suggested that Congress deal with the situation. S. 950 does so in a manner which puts all professional sports on a common footing with respect to their basic practices. This is right and proper and eliminates an unjustifiable discrimination.

Lastly, we believe the hearings before this committee have amply demonstrated that it is more accurate to think of the bill as a congressional statement—based on careful exploration of all the underlying circumstances—of how the antitrust laws are to apply to professional sports than as a bill exempting professional sports from the antitrust laws. The bill is carefully qualified in scope and is limited to those essential sports practices on which all sports leagues depend. By removing these essential sports practices from the application of the antitrust laws, this committee is simply stating what logic and reason require—that the antitrust laws were never intended to interfere with the successful presentation of professional sports to the American public.

For these, and all the very practical reasons which have been elaborated on at prior hearings, the National Football League urges this committee to favorably report S. 950 at an early date.

The league has been asked to comment specifically on two matters of general interest. Neither of these is directly related to the provisions of S. 950. Neither should, I think, be considered as any longer posing significant issues.

The first is the matter of telecasts of National Football League games on Friday nights during the regualr college or high school season. As the league has stated before, it has long viewed Sunday afternoon as the appropriate and traditional time for professional football games. It has never contemplated a regular series of Friday night football games. The NFL schedule for 1965, for example, does not schedule a single regular-season game on Friday night.

On the other hand, the NFL does not have access to a clean slate when it comes to scheduling. Nine of the NFL's 14-member clubs share use of their home fields with major league baseball teams—which usually have prior claims on stadium use. Other stadium uses, such as by colleges, may occasionally present problems of turf condition and stadium cleanups. As a result, a Friday, Saturday, or Monday night game may occasionally become unavoidable in a particular season.

During the 1964 season, for example, two of our franchises, the St. Louis Cardinals and the New York Giants, would have been unable to obtain use of their home stadiums during the first 5 weeks of the season if the league had not scheduled one night game in each of these cities, one on a Monday night and one on a Friday night. When this occurs, the issue is not whether the NFL should be permitted to abandon its traditional Sunday scheduling, but whether the fans of NFL football must be deprived of their traditional television privileges. The NFL is confident that the fans in our league cities would wish to make their views known on this question should they be deprvied of this TV coverage they have come to expect.

It is difficult to believe that any realistic interests of America's high schools or colleges are involved in this question. In any event, it is a problem which is not raised by either the pending bill or by present NFL scheduling.

Concern has also been expressed by some members of the subcommittee on the signing of college players by professional teams before their eligibility for intercollegiate competition has ended.

Since last fall, the National Football League has adopted a policy, binding on each of its member clubs, against the signing of any college player to any contract or to any form of document of intent, directly or through an agent, until after completion of all his team's football games, including bowl contests, in which he is available to participate during his senior year. This pledge, never before made in any form by the National Football League, has been confirmed in writing to the appropriate collegiate authorities. The pledge has been signed by the 14 clubs and by myself as commissioner. It has been further implemented by new language in the National Football League constitution and bylaws providing for strong disciplinary measures against any member club violating the restrictions thus imposed. A copy of my letter to Mr. James Corbett, chairman of the NCAA College-Professional Relations Committee, on this subject is attached.

APRIL 7, 1965.

Mr. JAMES J. CORBETT,
Director of Athletics,
Louisiana State University,
Baton Rouge, La.

DEAR JIM: This letter is addressed to you in your capacity as chairman of the NCAA College-Professional Relations Committee and is being sent to you as stated in our public pledge of last January 12.

At that time, we, the undersigned on behalf of 14 National Football League teams, through league Commissioner Pete Rozelle stated:

"No player will be signed to a contract or any form of document of intent, directly or through an agent, until after completion of all his team's football games, including bowl contests, in which he is available to participate during his senior year. This will include collegiate football players who actually compete in seasons beyond the graduating date of their original class."

And at the time of the pledge, we also stated that it would be further implemented by appropriate language providing for disciplinary measures to be placed in the league constitution at the annual meeting.

This was accomplished on February 16 when the National Football League constitution and bylaws was amended unanimously as follows:

"No player may be signed to a contract or any other document (including a letter of intent), directly or indirectly, until completion of all football games, including postseason bowl games in which the team of the school or college of such

player is to participate and in which the player is to participate; such provision shall also apply to college football players competing in football in any season ending after the date when the original class of such player shall have been graduated.

"If a club violates this section it shall be subject to disciplinary action by the commissioner, after notice and hearing; such punishment shall provide for the loss of selection choices of the offending club in the next or succeeding selection meetings, up to and including an entire selection list. All negotiating rights to the player so involved shall be awarded to the club lowest in the league standings, excluding the offending club, at the time of the last selection meeting."

This letter shall serve as the personal assurance that every club in the National Football League will adhere fully to this policy in every respect.

Sincerely,

Carroll Rosenbloom, Baltimore Colts Football Club; Geo. S. Halas, Chicago Bears Football Club; Art Modell, Cleveland Browns Football Club; Texas E. Schramm, Dallas Cowboys Football Club; Edwin J. Anderson, Detroit Lions Football Club; Dominic Olejniczak, Green Bay Packers Football Club; Daniel F. Reeves, Los Angeles Rams Football Club; E. W. Boyer, Minnesota Vikings Football Club; John V. Mara, New York Giants Football Club; Jerry Wolman, Philadelphia Eagles Football Club; Arthur J. Rooney, Pittsburgh Steelers Football Club; Charles W. Bidwill, St. Louis Cardinals Football Club; Louis G. Spadia, San Francisco 49ers Football Club; C. Leo DeOrsey, Washington Redskins Football Club; Pete Rozelle, Commissioner.

The CHAIRMAN. Our next witness is Gilbert Stein, vice president and general counsel of the National Hockey League.

Senator SPECTER. Before Mr. Stein begins, I would like to make a statement.

I have noted a very distinguished curriculum vitae from Mr. Stein, but he has apparently left off his position as deputy district attorney for the city of Philadelphia in the period from 1968 to 1971—2 or 3?

Mr. STEIN. Two years, 1968 and 1969, Senator.

Senator SPECTER. And because I have the occasion to have some intimate knowledge of his extraordinary qualifications, since I was district attorney at that time, I do want the record to be complete and to give him my special welcome to testify here today.

The CHAIRMAN. As I understand, Senator, you recommend him highly.

Senator SPECTER. Very highly.

The CHAIRMAN. And since he knows, do you recommend highly the Senator too?

Mr. STEIN. Absolutely; my recommendations generally consist of voting for him.

The CHAIRMAN. I would too.

Senator SPECTER. Mr. Stein, you are being a party to what is called senatorial courtesy.

The CHAIRMAN. We are very pleased to have you. I assure you we share your high regard for the distinguished Senator from Pennsylvania.

You may proceed.

Mr. STEIN. I understand that the written statement will be made a part of the record.

The CHAIRMAN. You can use it if it is short. If you can say anything that is not in that statement, we are glad to hear from you or you can read your statement.

STATEMENT OF GILBERT STEIN, VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL HOCKEY LEAGUE

Mr. STEIN. The statement primarily indicates the National Hockey League would endorse and support S. 610.

Our recommendation would be that to be in a modified form. The reason for that is we think several issues need to be addressed and one is the issue of a high school athlete having to make a decision as to whether he goes to college or not when he is faced with the temptations of turning pro, and, with a rule such as the rule in the National Football League, the kind of rule that is clearly contemplated as being given sanction by this legislation, he would know that once he matriculated in college, he would then be foreclosed from leaving college to turn pro.

And I say that not withstanding the National Football League's rule as to a 5-year period as well.

We think that if we can focus on where the problem arises—I have heard a lot of talk by the two gentlemen from the football leagues as to the problem arising from agents and, indeed, that is one of the areas where it arises. But I think there is a greater danger from the point of view of the public interest that this bill contemplates, and that is that a maverick owner within a league decides that he is going to challenge the rule—and there is precedent for that. Just as the National Football League has for over a half century had a rule, the National Hockey League had some 60 years whereby we did not allow eligibility to play in the National Hockey League until the player reached age 20. Just like the fledgling USFL did in football, when the World Hockey Association came into being in 1972, it adopted the same rule as the existing league. However, in the mid-1970's, one of the owners in the World Hockey Association decided he would go after an 18-year-old player and did so and the league said, the World Hockey Association said, no, that is a violation of that rule and that owner challenged his own league in court and there was litigation in Connecticut which was won by the maverick owner, which then created a situation where now 18-year-olds were to be drafted.

That owner, by the way, is an owner in the USFL right now. So right now his team is doing well. He would not want to break the rule with respect to signing college athletes. If his team starts faring poorly, he might revert to the action he took in the World Hockey Association and sign the next Herschel Walker, regardless of the fact that his league was not in favor of it.

That certainly could happen in the National Football League if Mr. Davis, whom we already heard about, a year ago had decided that he was going to sign Herschel Walker, regardless of the league rule that has been in effect for over 50 years. It would not be Herschel Walker and his agent, it would have been Mr. Davis bringing the litigation and I do believe the practicality of mounting this type of legislation makes it tough realistically for a player and

whoever his agent might be to spend the money to mount an antitrust suit.

But a maverick in the league, as we have seen with Mr. Davis in the last year, would have no such compunction.

I think you need to focus on more than an agent possibly bringing a lawsuit. I think you need to focus on a maverick owner bringing an action.

We think our 20-year-old rule made a lot of sense because a player in hockey needs a degree of maturity, needs a degree of physical growth and strengthening that had worked for 60 years to get him to the point where he was ready to get into the professional ranks, and there is an availability in Canada, which is where we have a lot of our hockey played at the junior hockey level, where the players are eligible to play junior hockey until they are age 20, and from that point of view it is similar—it is analogous to football facing the college eligibility which goes to maybe age 21 or 22.

So we did not think anyone was being denied an opportunity to develop his skills and to become a professional hockey player. We felt you do far more good for all of the players if they are required to come along at the appropriate level and class of play before they are ready to go into the pros. The agents do have blandishments. The agents will say, we want you to come and there is always the maverick owner who, out of desperation, either wanting something, to make a fuss from a PR point of view, or to improve his team, if he thinks it will work that way, will go out and sign the player to break the barrier that the rule provides and in that instance, a bill like S. 610 helps the league because it can then police its own membership.

That is the area where help is needed, just as much as the player with his agent going out to challenge the rule.

So we support it. If this legislation were in effect, I believe it is unlikely the National Hockey League would put a rule into effect similar to football. I think if this legislation were modified to the point where we could reinstate a 20-year-old requirement for playing hockey in the National Hockey League, for either drafting or signing a player, I am confident that our league would put such a rule into effect.

The CHAIRMAN. Thank you, Mr. Stein.

In your statement you suggest that S. 610 in its present form may actually discourage students from attending college because of fear that they will be locked out of professional sports for 4 years.

Under the current system in professional football, a student is locked out whether or not he attends college. Do you feel that the decision to turn professional should be made by the colleges and sports leagues rather than by the athlete himself?

Mr. STEIN. I think the athlete should make the decision. I do think that we need to have some way of protecting an athlete during years—or a youngster during years that he has not reached a level of maturity to know what is in his best interest, and parents provide that generally, and sometimes a league with the intimate knowledge of the requisite physical ability needed to establish a profitable and long-term career stands in loco parentis and is better able to judge than perhaps the athlete is himself—who is doing very well at a certain class of play and has everybody back-

slapping him and agents telling him "you are ready for the pros". Turning pro prematurely is not necessarily in the best interest of that athlete and that youngster is being able to have a long enduring and profitable career in that particular profession.

The CHAIRMAN. Mr. Stein, an antitrust challenge was made to the basketball league eligibility rules in the *Denver Rockets* case and you state that the hockey league rules were challenged in the *Linesman* case.

Why do you think that the rules of the NFL have never been challenged?

Mr. STEIN. I think the rules of the NFL have not been challenged because certainly, as I said before, in hockey it was an owner who decided to challenge the rule within his own league and I think the National Football League until very recent vintage has been blessed with a cadre of owners who respected the overall benefit to the business in which they were engaged in following the rules and living by the ground rules that everyone had to live by. But I do not think that situation exists today in the National Football League and as an outsider totally, my opinion would be if the USFL club had not signed Herschel Walker, we might have seen an owner such as Mr. Davis taking a shot at that within the National Football League.

The CHAIRMAN. The distinguished Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Stein, there is a certain amount of reluctance in the Congress to do anything to change the status quo. We look around at the hockey league, the football league, the baseball league, and see general prosperity, see things working pretty well.

What is your assessment as to how well sports are functioning in the overall legal climate at the present time with the rules the way they are? They are very different for baseball and football. With baseball enjoying an antitrust exemption, with football having its contact, as you pointed out, between Mr. Davis and the league and your own problems unique to hockey or basketball. But, overall, how do you think things are working out?

Mr. STEIN. My approach has always been I do not want to see the antitrust laws amended from the point of view of what is the basic thrust of the antitrust laws. But I do think clarifications are in order when the court ends up using the antitrust laws in an area that I do not think Congress ever intended it be applied to.

And in a situation like we are facing here, I think back to 1980 and how proud I felt as an American to see the Olympic team in hockey defeat the Soviet Union's Olympic team. That was a wonderful experience that I know everybody in the United States shares and everybody in the Free World shared. It hurts me to think that had we then had our 18-year-old rule in effect, this never would have happened, it never would have been possible. We have two players in the National Hockey League, Bobby Carpenter in Washington and Phil Housley with Buffalo, outstanding high school players, came out of high school. Because we had to put our rule back to 18, which we did just a few years ago, these youngsters turned pro.

Now had we had our rule continue in effect until age 20, the likelihood is that both of them and others would be playing for the 1984 Olympic team.

I think the players who played in the 1980 Olympic team, because they were ineligible to turn pro at age 18 or 19, did not hurt their careers any. Those who played were able, through the experience of the Olympic victory, their Olympic career, were better able to prepare themselves. We have Ken Morrow, who probably would have turned pro a couple of years earlier and not been part of that great Olympic victory. His professional career will be no less profitable to him by virtue of having played in the Olympics and waiting until age 20 than it would have, in my view, had he signed at age 18, before he was physically and mentally and probably emotionally tough enough to do so.

Senator SPECTER. Your suggestion would limit congressional action. Some specific court case has made change, like the modification of 20 years to 18 years on hockey, as you say, and it might justify some congressional action if we really see a problem with the Herschel Walker signing, if it becomes sizable.

But overall, aside from reactions to some specific cases where, as you say, the courts have interpreted the antitrust laws in a way they had not been intended, which is subject to congressional correction, you would recommend otherwise leaving the antitrust laws as they stand. Has the interaction among the sports leagues and teams and players generally been satisfactory?

Mr. STEIN. Yes, yes, and I say that with due regard that you and I might disagree as to the area in which I apply my definition that the antitrust laws as originally intended were not to apply to sports.

Senator SPECTER. We have replied with some suggestions about the Oakland Raider move with legislation that would give Oakland some claim on the fans' interest. There is, however, a great reluctance to move very far.

Mr. Stein, picking up the issue of Herschel Walker itself, there are those who argue very vigorously that a college player ought to have the right to sign as he chooses and that the Walker situation is genuinely a violation of the antitrust laws, that is, the Walker situation where he could not sign is genuinely a violation of the antitrust laws because a man in his situation ought to be permitted to do as he pleases.

As a student of sports and a student of the law and a student of the antitrust laws, what is your evaluation of those competing interests on that issue?

Mr. STEIN. Well, obviously, you are always into a balancing of interests point of view. But it seems to me—I think that the people who are most experienced in what it takes to play professionally are better able to make a judgment than a youngster aged 18 or 19 years old. And you get into a literal interpretation of the antitrust laws. There was a player in hockey who had one eye. He had lost one eye and we had a rule that said you had to see out of both eyes in order to play hockey. We would not allow that player to play. One of our own clubs initiated the problem by drafting him and saying we want him and we ended up with a legal challenge. We went through 2 or 3 years of extensive and expensive litigation

over an issue that should have been so obvious to anyone and that is why—did Congress ever intend the antitrust laws to apply to a league's decision that says we are not going to let you come in and play hockey and endanger your going totally blind and run that kind of risk as well as risk to others because you do not have total peripheral vision?

Senator SPECTER. Did you win?

Mr. STEIN. Yes, we eventually did. But it did not—I think it raises false hopes. I think that youngster should have known that a professional career is not for him. I do not know that he and his mother and family should have had to endure for maybe 3 years the fighting and hoping that they would win the battle because of the interpretations that their lawyers gave them that he could play as a one-eyed player in hockey.

I think we who are in the business are better able to know what it takes for a youngster to be able to have—to be able to compete in our leagues.

Senator SPECTER. Mr. Stein, are you sufficiently familiar with the tenth circuit's ruling on the case involving the Universities of Oklahoma and Georgia to express an opinion as to whether that decision may have any ramifications for other professional television arrangements?

Mr. STEIN. No.

Senator SPECTER. The National Basketball Association and its players union recently agreed to a new cost of bargaining agreement which protects some $3.6 million for the 1984-1985 season. We have already had some testimony about the interrelationship between the labor laws and the antitrust laws.

Does that kind of a bargaining agreement have any implications for other sports like hockey or like football, in your judgment?

Mr. STEIN. Well, you are talking about precedents that a new line—a new approach was taken in that collective bargaining agreement that had not yet been agreed to between the competing sides or the contracting sides in the other sports. But there is nothing that that does that in any way runs afoul of the antitrust laws. We are confident that the public policy of support for the right to collectively bargain provides the nonstatutory exemption to the antitrust laws when properly confined to the three basic issues and in this case we believe it was met and whether or not our league in future negotiations with our players would follow that kind of a precedent, can only be determined in the future when we hear what the players want and whether it makes sense for the owners.

BASEBALL LEAGUE NOT UNDER ANTITRUST LAWS

Senator SPECTER. The baseball league is not under the antitrust laws. All the other professional sports are. Do you think there are enormous differences in the application of what goes on among players to teams, teams to other teams, teams to the league, because one major sport like baseball is exempt and other major sports like hockey, football, basketball are under the antitrust laws?

Mr. STEIN. I think there is a difference in the actions we need to take and I think there is no rational basis in my mind for the other sports not having the same benefit that baseball has.

Senator SPECTER. Do you think hockey suffers because it plays under a different set of rules than baseball enjoys?

Mr. STEIN. We suffered economically from having to defend a number of lawsuits. I do not think we would end up with any basic organic law or statutory law in our league that would run afoul of fair play. I think we are entitled to the same benefits that the courts and the Congress have traditionally afforded baseball.

Senator SPECTER. So it is really the cost of litigation rather than any fundamental difference and approach, one under the antitrust laws, one not?

Mr. STEIN. I believe so.

Senator SPECTER. Thank you very much, Mr. Stein. Your testimony is very helpful, as always.

The Chairman. Thank you very much, Mr. Stein. We are glad to have had you with us.

[Prepared statement of Gilbert Stein follows:]

STATEMENT

OF

GILBERT STEIN

VICE PRESIDENT AND GENERAL COUNSEL

NATIONAL HOCKEY LEAGUE

Mr. Chairman and members of the Committee, I am Gilbert Stein, Vice President and General Counsel of the National Hockey League. I appreciate the opportunity to testify on behalf of the NHL on S. 610, the "Collegiate Student-Athlete Protection Act of 1983." The National Hockey League is pleased to present its views on this legislation.

The League supports the purpose of this bill, which is to grant a limited exemption from the antitrust laws to permit professional sports clubs to enact rules regarding the recruitment of college athletes. We question, however, whether such an exemption should be premised exclusively on a league rule that requires a student-athlete to complete his undergraduate study before he can play professionally. The NHL suggests that an exemption might be better predicated on a broader rule that encourages a student-athlete to attend college, but leaves some flexibility for players to sign before graduation from a four year institution.

The National Hockey League was founded over sixty-five years ago. In that time it has grown from six clubs to twenty-one, fourteen of which are in the United States. For over sixty of those years, Mr. Chairman, the NHL operated under a rule that prohibited the drafting or signing of a player before he was twenty years of age.

It was only several years ago, in the face of threatened antitrust litigation and mindful of the Connecticut District Court's decision in Linesman v. World Hockey Association, 439 F. Supp. 1315 (D.C. Conn. 1977), that the League reluctantly lowered that age limit to eighteen. Prior to that we did not draft players coming out of high school.

Our rule now provides that if a player is at least eighteen years of age prior to September 15 of the playing year, he is eligible for that year's entry draft. For example, if a player will be eighteen by September 15, 1983, he is eligible for the 1983 entry draft which will be held in several weeks.

Of the 252 players selected in the 1982 Entry Draft, thirty-eight were drafted coming out of U.S. high schools. It is estimated that a similar number will be drafted this year and again in 1984.

Unfortunately, very few eighteen year old players are ready for the NHL. Nonetheless, because of the antitrust threat, the League was compelled to lower its draft eligible age to eighteen.

Some of these players will decide not to turn professional and will continue their education in college. Others, however, will sign with NHL clubs. A few will play in the NHL, but most will likely be assigned to a club in the U.S. minor leagues for further development and experience.

Eligibility and drafting at eighteen is understandably unpopular with American colleges and amateur teams because it takes the premier players and weakens their programs. It may also adversely affect U.S. hockey in the international arena. There are several outstanding American youngsters now in the NHL who, but for our eighteen year old rule, would be playing for the United States Olympic team in 1984. Depending upon how many of these eighteen year old players turn pro and how many collegians turn pro before completing college, the likelihood at the 1984 Olympics of a repeat of the "Miracle of Lake Placid," where our Olympians won the gold medal from the Russians, may be all but impossible.

Mr. Chairman, as I indicated, the NHL changed its age rule on eligibility in order to avoid antitrust liability. Were legislation enacted granting an appropriate limited exemption from the antitrust laws, I believe the NHL would reinstate its twenty year old minimum age requirement.

At the same time, however, the League is concerned that S. 610 in its present form might discourage students from attending college out of fear they will be locked out of professional sports for four years.

What would be the effect on college enrollment of outstanding high school athletes if a high school senior is told that if he elects to go to college, he will be denied, for the next four years, the opportunity that his non-matriculating high school teammates have - the opportunity to turn professional? Will professional sports clubs start enticing the great athletes coming out of high school to turn pro immediately rather than enroll in college, as happened in basketball to Moses Malone and Darryl Dawkins?

Perhaps professional football and basketball would not do so because college competition has traditionally given the athlete the reputation that makes him valuable as a pro. But in hockey, and, I believe, in baseball as well, the professional teams are often in direct competition with college recruiters for outstanding high school athletes.

An additional approach that would be more realistic to hockey, from both the players' and teams' point of view, would be a rule that would allow a player to go to college but still be drafted at age twenty. We would respectfully suggest a small amendment to S. 610 that would take this into consideration as follows:

> "The antitrust laws as defined in section 1 of the Clayton Act, and in the Federal Trade Commission Act shall not apply to a joint agreement by or among persons engaging in or conducting the professional sports of football, baseball, basketball, soccer or hockey designed to encourage (~~college~~) student-athletes to attend college and to complete their undergraduate education before becoming professional athletes, by prohibiting the drafting or signing of a player for a specified period of time, which shall be not less than two years nor more than four years after he graduates from high school."

If the bill were so amended, it is my belief the NHL would enact a rule prohibiting the drafting or signing of a player until two years after his class graduated from high school.

In addition to providing an exemption from the antitrust laws, Mr. Chairman, I respectfully suggest the Committee also consider amending the bill to provide an exemption from the Age Discrimination Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. sec. 621 et seq. (1976 Ed. and Supp. IV), to preclude creative litigation on the premise that a rule prohibiting the

drafting or signing of a player for a given number of years after he graduates high school operates as a de facto discrimination against college age student-athletes.

Mr. Chairman, the NHL appreciates this opportunity to present its views on this legislation and thanks the Committee for its interest. I will be happy to answer any questions. Thank you.

The CHAIRMAN. Mr. Kenneth Moffett, executive director of the Major League Baseball Players Association.

Mr. MOFFETT. I have with me David Vaughn, senior counsel of the Major League Baseball Players Association

The CHAIRMAN. I have another engagement. I am going to have to go. I am going to request the distinguished Senator from Pennsylvania to take over the hearing.

I just want to express my appreciation to you for being here and where is Mr. Dull from the University of Maryland? Is he here?

If you will tell him I had to go to another engagement but we will read his testimony and we appreciate his being here.

Mr. MOFFETT. Thank you, Mr. Chairman.

Senator SPECTER. You are Mr. Moffett?

Mr. MOFFETT. That is correct.

Senator SPECTER [presiding]. Welcome and you may proceed.

STATEMENT OF KENNETH E. MOFFETT, EXECUTIVE DIRECTOR, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION

Mr. MOFFETT. I wish to thank the committee for the opportunity to summarize the views of the Major League Baseball Players Association concerning S. 610, the Collegiate Student-Athlete Protection Act of 1983, and to attempt to place in perspective from the Association's point of view the use of an exemption from the antitrust laws to achieve the policy objectives of S. 610.

We have provided the committee with a full statement from which this summary is taken. We would request that the full statement be made a part of the record.

Senator SPECTER. It shall be.

Mr. MOFFETT. The association appreciates the committee's recognition that professional sports is a big business, with significant impact on interstate commerce and commends Senator Specter's firm and consistent position that Congress should not enact laws which provide blanket exemption from the antitrust laws for the professional sports industry.

The association commends Senator Specter for his interest in encouraging student athletes to complete their formal education. As commendable as is the objective of S. 610, the use of an antitrust exemption to accomplish its purpose would represent a move in the wrong direction and would present potential for abuse.

Professional baseball remains the only industry in this country which is both free from Government regulation and exempt from the antitrust laws. The blanket exemption allows owners to restrict competition, fix prices, and divide markets.

Not surprisingly, the legal monopoly enjoyed by professional baseball has worked to the advantage of only one group; the owners of professional baseball teams. The exemption has worked to the clear disadvantage of everyone else: Cities seeking to retain or secure franchises, fans, dissenting owners, the public in general and, of course, the players: Amateur players, minor league players, and major league players.

It is the position of the association that Congress should move permanently to eliminate baseball's exemption from the antitrust laws.

The exemption dates back to the 1922 *Federal Baseball League* decision which held that baseball was outside the scope of the Federal antitrust laws. That decision since has been criticized and the result of *Federal Baseball* has been described in subsequent decisions as "illogical" and an "anomaly."

In the 1970 *Curt Flood* case, the Supreme Court passed the ball back to Congress. Chief Justice Burger said, "It is time the Congress acted to solve this problem."

The Select Commmittee on Special Sports of the House, the Department of Justice under the last three administrations, and, indeed, all of the witnesses in all of the recent hearings except representatives of the owners, have agreed that the exemption should be ended.

While it is true that major league players have made economic gains in recent years, it is also true that those gains have come over the continuous, rigorous opposition of the owners.

Senator SPECTER. Do you think baseball players would be better benefited, if I might interrupt you, if baseball were subject to the antitrust laws?

Mr. MOFFETT. If they were subject? I think there is a good chance they would, sir, particularly as you reach down into the minor leagues and into the amateurs as well.

Senator SPECTER. Baseball players have worked it out in a somewhat different way as a result of the arbitration award so that within the baseball system there is a free agency under a certain set of rules that have enabled the baseball players to deal with the owners. Just given the blanket exemption from the antitrust laws, there would have been nothing had baseball played its cards differently, so to speak, to have maintained the monopoly position with respect to the players and to have kept them on a much tighter rein, in a much more constricted bargaining position. Could not baseball have done that?

Mr. MOFFETT. Except for one reason: If it had not been for the strong union and the fact that the union took the position they did after they won the arbitration case and worked it out.

Senator SPECTER. Why did baseball ever agree to that arbitration?

Mr. MOFFETT. Because it was in the agreement.

Senator SPECTER. Why did baseball ever agree to the agreement?

Mr. MOFFETT. To the agreement? Because the players were unified.

Senator SPECTER. The players would have struck?

Mr. MOFFETT. They did—they have struck twice.

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Senator SPECTER. They had not struck in advance of the agreement which opened up the arbitration procedure, had they?

Mr. MOFFETT. They struck in 1972 over a pension matter.

Senator SPECTER. And when did the arbitration clause arise?

Mr. MOFFETT. 1976.

Senator SPECTER. So the players did not strike over that specifically but you think that might have been grounds for a strike?

Mr. MOFFETT. Absolutely, sir, if it had not been agreed mutually between the parties.

Senator SPECTER. Well, it is entirely possible that had baseball not worked out its own compensatory arrangements to give that flexibility, the Congress might have a different attitude about baseball under the antitrust laws and the courts would have had a different attitude about baseball under the antitrust laws.

Mr. MOFFETT. They certainly did not for a lot of years prior to that, sir, and I think it is only because of the union taking the strong position they did and the fact that they were so unified that the players have what they have today.

Senator SPECTER. Well, the question that comes to my mind, is do we have procedures in our country for working out these issues? I asked the question of Mr. Stein, which I believe you heard, about whether hockey was in a significantly different position than baseball and he responded that the cost of litigation made a difference. I see what has happened in baseball to provide leeway for the players to have rights, to sell their services to other teams under free agency rule, and it seems to me that somehow in our system, notwithstanding what the Congress may do or the courts may do, that the private parties work it out to the great credit of the private parties. I just wonder what your thoughts are about that general conclusion.

Mr. MOFFETT. My general conclusion is, as I have stated before, if it had not been for the arbitration decision and if it had not been for the unity of the players, the situation would be even much worse than what it is today.

Senator SPECTER. Given those factors, is it working out reasonably well today on the compensation line?

Mr. MOFFETT. Did you say compensation wise?

Senator SPECTER. On the compensation line?

Mr. MOFFETT. You are talking about the compensation issue which was the matter of the 1981 strike or are you talking about the mobility of players from one team to another?

Senator SPECTER. Both.

Mr. MOFFETT. All right. As far as that is concerned, in the major leagues, a person has to wait for 6 years before he can move from one team to another. That is not the case in any other industry in the United States.

Senator SPECTER. You think that is unduly restrictive?

Mr. MOFFETT. Well, I think it is something that has been agreed to by both parties after the arbitration award. But I think as far as the minor leagues are concerned, all of the minor league players, which are in a far greater number than in the majors—there are only 650 major league baseball players—the players are nothing but chattels of the owners and they are stuck unless the owners wish to release them.

Senator SPECTER. You think the minor league players are unfairly treated?

Mr. MOFFETT. I believe so.

Senator SPECTER. Do you think the major leagues are fairly treated?

Mr. MOFFETT. I think the major league players are treated the way they are today as a result of their union.

Senator SPECTER. How about my question?

Mr. MOFFETT. Your question relative to the antitrust——

Senator SPECTER. Are the major league players fairly treated?

Mr. MOFFETT. I would say the major league players have had probably one of the most chaotic labor relations situations I know of in my 28 years in collective bargaining and the only reason they have what they have today is because they have fought for it.

Senator SPECTER. Are the major league players fairly treated?

Mr. MOFFETT. It depends on the circumstances and the situation with the various clubs.

Senator SPECTER. Some are and some are not?

Mr. MOFFETT. That is correct.

Senator SPECTER. But overall, would you say they are fairly treated?

Mr. MOFFETT. I would have to say that the contract that they have is policed by the association and by the player representatives on the particular club and as a result of that, they have to fight for everything that they have.

Senator SPECTER. But given the battles and the union's activities overall with the policing of the contracts, the major league players are fairly treated?

Mr. MOFFETT. For the most part.

Senator SPECTER. If the antitrust laws did not apply to baseball, would minor league players be in a position to protect themselves and to be fairly treated, in your judgment?

Mr. MOFFETT. More so, yes, sir.

Senator SPECTER. What would taking baseball's antitrust exemption away do for the minor league players that they cannot do for themselves given the tenacity of the players?

Mr. MOFFETT. Could I turn that question over to my counsel?

Senator SPECTER. Sure.

Mr. VAUGHN. Your question, as I understand it, is what the minor leagues could do in the absence of antitrust laws?

NO UNION PROTECTION

Senator SPECTER. Mr. Moffett is saying that baseball ought to be out from under the antitrust laws and he testified to the narrow range of this issue. He does not like it because it is a further exemption from antitrust laws. He is using this occasion to attack the general status of baseball being exempt from the antitrust laws. I am trying to explore what are the reasons that baseball, in your judgments, ought to be out from under the antitrust laws and I am coming to the issue of whether the minor league players and the major league players are fairly treated because they have had a tremendous battle. The union has won concessions and they have

to be policed, but the battles put them in a position where they are fairly treated.

Now my question is on the minor leagues. Can you get the minor leagues to he fairly treated if you use the same tactics?

Mr. VAUGHN. The minor league players enjoy no union protection and, therefore, lack the kind of organizational leverage——

Senator SPECTER. Can they get themselves a union?

Mr. VAUGHN. That is theoretically possible. As a practical matter, because of the fact that the minor leagues are by definition a stepping stone to either the major leagues, or unfortunately, a stepping stone back to private life, the likelihood that that will happen is not high.

Senator SPECTER. What would their situation be if the antitrust laws did not exempt baseball? You are saying that the nature of their profession is such that they are not likely to be unionized or to have the benefits that have come to major leaguers because of the union and my question then is, well, what good would it do them if the antitrust laws did not apply to baseball?

Mr. VAUGHN. An individual minor league player or a class of minor league players would have the right to go into the court and to challenge the reasonableness of the minor league rules on matters such as the reserve clause, on matters such as baseball's draft system.

Senator SPECTER. Would that be realistic?

Mr. VAUGHN. It has occurred in other sports.

Senator SPECTER. Minor league sports?

Mr. VAUGHN. Not necessarily minor league sports, but the law would cover them.

Senator SPECTER. But is it realistic to finance that kind of litigation?

Mr. VAUGHN. It may well be realistic to finance that kind of litigation. I certainly would not preclude that possibility, and it seems to me they at least should have the right of access to the courts that other citizens have.

Senator SPECTER. If that is realistic, why isn't it realistic for them to form a union?

Mr. VAUGHN. Primarily because of the transitory nature of their careers and the fact that at every stage a potential litigant sees a future in professional baseball and is not interested in wanting to offend the owners.

Senator SPECTER. That situation is present on the antitrust law side. If they were exempt from court, they would encounter the same problems.

Mr. Moffett, what other aspects of the public welfare would he served if baseball were not privileged with the antitrust exemption?

Mr. MOFFETT. We recently had an experience, Senator, where the owners passed an internal rule which limited the amount of moneys that could be expended by each one of the clubs, as far as salaries and other expenses are concerned. It is our advice that clearly if this rule were enacted, and baseball were not exempt from the antitrust laws, the owners certainly could not have done this.

Senator SPECTER. Any other areas?

Mr. MOFFETT. We have filed a grievance along these lines and we are hoping to win this grievance.

Senator SPECTER. Is there any other area where you think the public interest would be served by striking out the exemption for baseball?

Mr. MOFFETT. I just think that it is unfair, that baseball players should be singled out differently than any other employees in the whole United States as being exempt from the antitrust laws.

Senator SPECTER. I understand your conclusion that it is unfair and it may well be. But what I am looking for are some consequences that are adverse to public policy which flow from baseball's exemption and would provide some impetus for change.

Mr. MOFFETT. The owners can engage in any kind of price fixing. They can do any kind of rulemaking. They can do anything at all.

Senator SPECTER. Do they?

Mr. MOFFETT. As far as the restraint of trade. To my knowledge there have been situations where certain people have not been granted franchises. There have been situations where people could not move clubs from one place to another and other such things as that.

Senator SPECTER. I interrupted you, Mr. Moffett, but I wanted to get your reasons. You may proceed.

Mr. MOFFETT. While it is true that the major leagues have made economic gains in recent years, it is also true that these gains have come over the continuous vigorous opposition of the owners. These gains are only as secure as the next owner attack at the time of contract expiration. Indeed, most players or amateurs of the minor leagues are subject to a unilaterally imposed draft and reserve system with no union to protect them.

There is no reason that baseball players and the public should not have the same antitrust protection enjoyed by all other citizens but until those rights are protected, the owners will continue to take advantage of the situation. Labor relations in the industry will continue to be chaotic. Neither the equal protection of the laws nor the public interest in competition will be served.

I am pleased to state that Congressman Seiberling is introducing the Sports Competition Act of 1982 which would repeal baseball's exemption by defining interstate commerce to include all professional sports, including baseball.

While baseball is the only industry and certainly the only professional sport whose owners enjoy a blanket exemption from the antitrust laws, there have been a number of special provisions exempting certain activities from these laws. In the last 2 years, numerous bills have been introduced to restrict the movement of sports franchises, allow for revenue sharing and for other purposes through the device of exempting the leagues from the antitrust laws.

Current law does not prohibit professional sports teams and leagues from regulating themselves in a reasonable manner consistent with the antitrust laws. The rule of reason, to which professional sports teams and leagues are subject, takes into account the special characteristics of each industry and allows practices which are commercially reasonable and not anticompetitive in the context of that industry. The cases cited in our statement demonstrate

that the laws are flexible enough in their application to accommodate the special circumstances of the sports industry.

Retreat from the protection of the fundamental national economic policies favoring competition which are found in antitrust laws, even in nominally narrow areas, should not be lightly undertaken. The result of using special purpose exemptions from the antitrust laws would be to create a mantel of protection filled with holes. Rules drafted by the owners pursuant to the exclusions would inevitably affect more than the intended area. For example, if Federal rules to protect student athletes might also restrict negotiations or fix prices. Indeed, under the guise of carrying out the purpose for which the exemption was created, the law might be used to shelter activity totally outside the intended scope of the rule. Such exemptions would be difficult to police and would lead to confusion and uncertainty.

Our second concern with respect to the use of special purpose antitrust exemptions is that, within the scope of such an exemption, the owner's actions are completely removed from external scrutiny. Senator Specter has properly pointed out that permitting rules which encourage a student athlete to complete his education will restrict the athlete's right to seek and obtain employment with an employer of his choice, a right which other citizens enjoy and value very highly. Application of the rule of reason under the antitrust laws helps to insure a balance between those competing interests and provides a mechanism whereby that balance may be reviewed. By contrast, an exemption from the antitrust laws for an owners' draft needs no effective check on the owner's activities.

Finally, eviceration of the antitrust laws should not be undertaken unless it is clear there are no alternative means to accomplish the desired result. There would appear to be a number of alternative methods to encourage athletes to complete their education: Delayed or contingent contracts, presigning or postretirement scholarships, tuition assistance during the off season, career counseling, and job placement services for players and prospective players, special extension courses provided by the league and scheduled around or during the season, to name a few. Some of these programs exist now in primitive form. Others await only the action or approval of the owners. We would respectfully submit that there are alternatives to advance the objective of S. 610 and, therefore, the use of an antitrust exemption is unwarranted.

Operating under their exemption from the antitrust laws, the baseball owners developed a system which regulates the acquisition of amateur players. A review of the owners' system may be useful to demonstrate some of the dangers in pursuing the objectives of S. 610 through manipulation of the antitrust laws.

Under the owners' system, a player may be drafted only by a single professional club. The club which drafts the player is given the exclusive right to negotiate with and sign the player. If the player wants to play but is either dissatisfied with the club which has drafted him or is unhappy with the contract offered, he is stuck. No other baseball club is permitted to sign, negotiate with, or otherwise discuss potential employment with the draftee. The player's only choice is to refuse to play and to wait until the next draft, 6 months later. The player can take a chance that a new

team might choose him but the player's choice under baseball's draft system are to sign with the team which owns the rights to him or give up a career in professional baseball. As one might expect, the economic leverage, unless you are John Elway and play two sports, is almost all one sided.

The owners' system contains elaborate rules which nominally encourage athletes to continue their education. However, the practical effect of these rules, which are summarized in our statement, is that, while the baseball rules may appear to offer restrictions to encourage athletes to finish school, it is clear that because of the numerous exceptions, they do not do so. The net result is that no one's interests are protected adequately by the draft system except the owners', and they are protected only from competing with each other.

The players association believes, based on its experience, that exempting from the antitrust laws rules to encourage amateur players to complete their education will not insure a proper balancing of the competing interests involved. Indeed, such an exemption will virtually insure that the owners adopt the most self-serving rule and will remove any necessity for the owners to justify the reasonableness of the rule.

In a larger sense, the players association believes that the activities of baseball and of all professional sports should be subject to the antitrust laws. Those laws offer a sufficiently flexible standard of reasonableness to accommodate the special circumstances of professional sports. Those circumstances do not justify exempting the professional sports industry from coverage of the same laws by which the rest of the society is governed, either on a blanket basis, such as the baseball owners enjoy, or for limited purposes such as those set forth in S. 610.

While the objective of S. 610 is laudable, the association believes that the mechanism put forward to achieve it would be, for the reasons discussed, a move both philosophically and practically in the wrong direction.

Thank you for the opportunity to present our views.

Senator SPECTER. I note you are born in Lykens, Pa. Where is that?

Mr. MOFFETT. It is 30 miles northeast of Harrisburg.

Senator SPECTER. Size?

Mr. MOFFETT. Two thousand five hundred.

Senator SPECTER. I know most of the towns in Pennsylvania but I do not know Lykens.

It is a special pleasure to have you.

Mr. MOFFETT. It is a pleasure to be here.

[Prepared statement of Kenneth E. Moffett follows:]

PREPARED STATEMENT OF KENNETH E. MOFFETT

Mr. Chairman, Members of the Committee:

My name is Kenneth E. Moffett. I am the Executive Director of the Major League Baseball Players Association. The Association is the exclusive collective bargaining representative for all major league baseball players. As the Association's Executive Director, I am its chief administrative officer and chief negotiator.

Prior to becoming Director of the Players Association on January 1 of this year, I served for 21 years with the Federal Mediation and Conciliation Service in a number of positions, including Director, Deputy Director, Director of Mediation

Services, and National Representative. While with the Service, I mediated a large number of significant labor disputes.

I wish to thank the Committee for the opportunity to appear today to present the views of the Players Association concerning S. 610, the Collegiate Student-Athlete Protection Act of 1983, and to attempt to place in perspective from the Assocation's point of view the use of an exemption from the antitrust laws to achieve the policy objectives of S. 610.

The Association commends Senator Specter for his interest in encouraging student athletes to complete their formal education. The importance of that objective is underscored by the very high percentage of athletes in all sports whose professional careers never develop to the point of providing them with stable employment or whose careers are ended prematurely by injury.

The Association appreciates the Committee's recognition that professional sports is a big business, with significant impact on interstate commerce, and commends Senator Specter's firm and consistent position that Congress should not enact laws which provide blanket exemptions from the antitrust laws for the professional sports industry. The Association was pleased to testify in September of 1982 in support of Senator Specter's bill on franchise relocation, S. 2821, which rejected such a position. Finally, we thank the Senator for his interest in thoroughly exploring at these hearings all of the issues surrounding the special purpose grant of antitrust immunity to the sports industry proposd by S. 610.

As commendable as is the objective of S. 610, the use of an antitrust exemption to accomplish its purpose would represent a move in the wrong direction and would present significant potential for abuse. The Association must therefore opposed that portion of S. 610.

Our concern is not merely acadamic. Professional baseball is, as you know, the only major industry exempt from the antitrust laws. The Players Association has had abundant opportunity to observe the operation of team owners and leagues under that exemption, including baseball's draft system for college and pre-college players. Our experience may be useful to the Committee in its deliberations.

My testimony is divided into three sections: first, a brief summary of the status and history of baseball's blanket exemption from the antitrust laws; second, a discussion of the policy reasons why the Association believes that creation of special purpose, limited scope exemptions from the antitrust laws are undesirable; and, third, a description and analysis of the owners' rules for dealing with amateur players under baseball's existing antitrust exemption.

I. BASEBALL OWNERS' ANTITRUST EXEMPTION

Professional baseball remains the only industry in this country which is both free from government regulation and free to engage in contracts combinations, and conspiracies in restraint of trade. Not surprisingly, the legal monopoly enjoyed by professional baseball has worked to the advantage of only one group—the owners of professional baseball teams. The exemption has worked to the clear disadvantage of everyone else: cities seeking to retain or secure franchises, fans, dissenting owners, the public in general, and, of course, the players: amateur players, minor league players and major league players.

It is the position of the Association that Congress should move promptly to eliminate baseball's exemption from the antitrust laws.[1]

Historical background

A brief summary of the historical background of baseball's antitrust exemption may help to place my subsequent testimony in context.

In *Federal Baseball Club* v. *National League*[2] the Supreme Court held that the business of professional baseball was outside the scope of the Federal antitrust laws. In 1953, in *Toolson* v. *New York Yankees*[3] the court reaffirmed its decision in *Federal Baseball*, suggesting that the "remedy" for its decision was to be found with the Congress, if at all. However, in 1956, in *Radovich* v. *National Football League*[4] the

[1] I endorse but will not attempt here to restate the testimony of Marvin Miller, former Executive Director of the Association, in support of the proposition that baseball's antitrust exemption should be eliminated. I would refer the members of the Subcommittee, however, to his testimony in 1976 before the House Select Committee on Professional Sports and his testimony before the Monopolies and Commercial Law Subcommittee of the House Judiciary Committee in February, 1982.

[2] 259 U.S. 200 (1922).

[3] 340 U.S. 356 (1953).

[4] 353 U.S. 445 (1957).

Supreme Court refused to extend baseball's antitrust exemption to football, and specifically noted that if it were to consider the question of baseball's antitrust exemption for the first time, it would hold baseball subject to the antitrust laws. Again, the Court noted the failure of the Congress to enact legislation overturning *Federal Baseball.*

The question of baseball's antitrust exemption last reached the Supreme Court in *Flood* v. *Kuhn,* 407 U.S. 258 (1972). The Court was unanimous in its opinion that baseball should never have been granted an exemption from the antitrust laws. Justice Blackmun's majority opinion noted that professional baseball is a business, that it is engaged in the interstate commerce, and that baseball's exemption is an "exception" and an "anomaly".

Nevertheless, the Court in the *Flood* case declined to correct this anomaly and aberration, again relying on the failure of Congress to enact remedial legislation in the face of the Court's concededly erroneous prior decisions in *Federal Baseball* and *Toolson.* The Court noted that the "illogic" of its position can only be remedied by the Congress. Chief Justice Burger stated: ". . . it is time the Congress acted to solve this problem." *Flood* v. *Kuhn,* 407 U.S. 258, 286 (1972). Absent action by the Congress, what has been universally acknowledged to be bad law will remain the law of the land.

Baseball's antitrust exemption was examined by the Congress in 1976 by the House Select Committee on Professional Sports (the Sisk Committee). After full opportunity to consider baseball's special antitrust status, the Committee reported:

"Based upon the information available to it, the Committee has concluded that adequate justification does not exist for baseball's special exemption from the antitrust laws and that its exemption should be removed in the context of overall sports antitrust reform."

Baseball's antitrust exemption should be eliminated

In its business dealing with third parties (e.g. all baseball players and municipalities desiring to secure or retain a franchise) organized professional baseball operates as a classic cartel. And, because baseball is immune from antitrust attack, it does so openly by a series of interlocking agreements which bind every professional baseball club to every other professional baseball club. Those agreements regulate almost every significant phase of each club's individual business operations. Each major league club is a party to the Major League Agreement, which defines the agreements and relationships by and between each major league club to every other major league club. Every minor league club is contractually bound to every other minor league club pursuant to the National Association Agreement. The Professional Baseball Agreement binds every major league club to every minor league club.

Pursuant to these and other agreements and regulations, each professional baseball club agrees to keep its "hand off" the "property" (e.g. players, etc.) of every other club in return for the other clubs' agreements to do the same. Thus, in those areas where baseball clubs would ordinarily be expected to compete with one another (for players, etc.) there are formal agreements not to compete. Markets are divided, prices and salaries are fixed, and free and open economic competition is effectively eliminated.

Testimony before the various Congressional Subcommittees and before the Select Committee in 1976 shows that, with the exception of a single category of witness, the opinion is unanimous that baseball's antitrust exemption should be eliminated. The only witnesses favoring retention of the exemption have been the representatives of baseball's owners and the representatives of the owners of other professional sports teams, who hope one day to persuade the Congress to exempt the other professional team sports from the ambit of the Sherman and Clayton Acts.

Organized professional baseball traditionally has put forth various contentions in support of retaining its antitrust exemption. In arguing to retain their exemption, baseball's owners assert that because baseball developed pursuant to the Supreme Court's holdings in *Federal Baseball* and *Toolson,* it would now be unfair to apply the antitrust laws to baseball. This "reliance" theory amounts to arguing that once an error of law is made (as concededly was made in *Federal Baseball*), it should never be corrected, because someone has "relied" upon the incorrect prior decision in conducting his business. Whenever legislation is considered, someone can assert that he has "relied" on the prior state of affairs. Because the Supreme Court erred in 1922, and refused to correct that error in 1953 and 1972, is no reason for this Congress in 1983 to perpetuate this state of affairs.

Baseball's owners further argued before the Select Committee that the antitrust exemption should not be eliminated because no identifiable group has been harmed, and because the collective bargaining relationship between the major league owners

and the Players Association makes antitrust coverage superfluous and potentially destructive of the "stability" of the bargaining relationship. Owners and their representatives have argued further that antitrust coverage would not be of benefit to major league players due to the labor exemption.

I must take strong exception to those contentions. All players have been harmed by baseball's exemption. The economic freedom of players covered by baseball's draft is severely and unnecessarily restricted. Most professional baseball players are in the minor leagues and lack any collective bargaining representation.

Let me describe briefly the situation which confronts an individual who wants to play professional baseball. First, the player will be "drafted", a process by which the owners agree that a single club will have the exclusive right to negotiate and sign the player and no other professional team will conduct any discussion with him with regard to potential employment. I will return to discuss the draft in more detail, since it bears directly on the issue of educational incentives for amateur athletes which is addressed by S. 610.

Once a player enters into a contract, he is "reserved" by the club which has signed him (or any other club to which his contract may be sold or traded). Unless the club subsequently determines that he lacks sufficient ability and releases—that is, discharges—him, or unless he is one of the few players who are talented enough and fortunate enough to achieve six years of professional service, he may not seek employment as a professional baseball player, even after the expiration of all of his contractual commitments, with any other professional baseball team anywhere in the United States, Canada, Latin America, or Japan. His only alternative is to cease to play professional baseball.

Major league players have also been severely disadvantaged by baseball's antitrust exemption. Due entirely to the antitrust exemption, baseball was the last of the four major professional team sports to achieve even limited relief from the perpetual reserve system in the form of free agency. Because of the exemption, baseball players have never had competing leagues to establish a market price for their services. Nor do players have the right to sue to end the clubs' price fixing with respect to salaries. The measure of how effective the owners price-fixing agreements were can be seen in the six-fold increase in salaries from 1976 (the last full season before the limited free agency secured in the 1976 Basic Agreement took effect) and 1982. In 1976 the mean major league salary was approximately $44,500. Last year it reached approximately $251,500.

Only the Players Association stands between the benefits and protections players now enjoy and a return to the pre-1976 era. While the Players Association, which represents major league players, is a strong union and has achieved many important advances for its members, that is not a basis upon which to base a public policy of denying the benefits of the antitrust laws to baseball players. Collective bargaining agreements are not permanent. Circumstances change, and one cannot conclude that because the Players Association has held its own in collective bargaining the last several years, it will always do so. The protection of the antitrust laws should be available to baseball players, as that protection is to all other Americans.

Baseball players are entitled under law to organize and bargain collectively, but that right is not one that is or should be given to the exclusion of other statutory protections. It is specious to argue that because major league players are currently represented by the Players Association, all players or potential players should be denied the protection of the antitrust laws. Baseball's owners should comply with the public policy of this nation, as set forth in both the antitrust laws and the labor laws, just like everyone else.

Before the Select Committee in 1976, the Commissioner of Baseball testified to the good, stable labor relations present in baseball, in support of baseball's twin arguments that (1) the collective bargaining system was working well and thus no change in baseball's antitrust status was warranted, and (2) that eliminating baseballs's exemption might somehow interfere with the collective bargaining process. My predecessor, Marvin Miller, expressed a contrary view, to which I adhere today. Following the Commissioner's testimony, there was a major confrontation when the 1976 Basic Agreement expired (after the end of the 1979 season). A strike was avoided in the Spring of 1980, on the eve of the strike deadline, by an agreement postponing the reserve system issues until 1981. In 1981 there was, as you know, a costly, bitter, fifty day strike.

The truth is, that in 1976 Labor relations were not good and had never been so. But for an arbitrator's interpretation of certain provisions of the standard player contract, no significant changes in baseball's reserve system would have been negotiated. The 1981 strike was precipitated by the owner's attempt to gut the free agency system. Because of the exemption, the owners in the 1981 negotiations acted

secure in the knowledge that if they were able to beat the Association they could eventualy reimpose whatever restrictive system they chose, without danger that they would be called into court and asked to justify its reasonableness. I submit that if the baseball owners lacked antitrust exemption, it would have been much less likely to force this confrontation, or any future confrontations on this issue. Baseball's antitrust immunity serves, in my view, as an impediment to good faith collective bargaining.

It is correct that in certain circumstances the labor exemption may serve as a defense to an antitrust action. The Players Association is certainly prepared to live with that result. But if baseball's owners combine in areas other than those permitted by a collective bargaining agreement reached as the result of good faith, arms-length bargaining, such actions should be required to pass muster under the antitrust law. When clubs conspire to limit or fix the salary and other terms and conditions that will be offered to free agents, the Players Association's remedy under the contract is to file a grievance. The grievance is eventually heard by an arbitrator, who determines if the clubs have been acting in concert, in violation of the labor contract, and if so, what the appropriate remedy should be. No significant discovery is available in arbitration, and the arbitrator's remedies are relatively limited.

Contrast that potential avenue of relief with those available under the antitrust laws, in which any conspiring clubs would face the possibility of a suit for injunctive relief, treble damages and attorneys' fees (as well as the possibility of criminal charges), in a proceeding in which the full discovery under the Federal Rules of Civil Procedure would be available before trial.

Such collusion by clubs in violation of our labor agreement is not idle speculation. There is considerable evidence that in 1981 the clubs conspired in violation of the Basic Agreement, in an attempt to limit the length of contracts, to force players to re-sign, in most instances, with their former clubs, and to prevent operation of a free market for free agent players' services. A grievance against the owners' action is now pending.

More recently, the owners have secretly agreed among themselves to require all clubs to maintain a ratio of "assets" to "liabilities" of 60/40. Under the owners' rule, by far the largest "liability" is player contracts, but the rule is distorted to exclude the asset value of those contracts and otherwise undervalue the club's worth. Owners who do not comply with the 60/40 rule are subject to severe sanctions, including removal of the club's officers and the effective placement of the club in receivership. The clear purpose of the owners' rule is to place a cap on salaries and to punish owners who, for legitimate business reasons, would choose to invest more money to acquire better players. The owners' rule restrains trade and fixes prices, completely outside the collective bargaining process, in ways which would be prohibited in any other industry. The reluctant negotiations, the conspiracy to constrain free agency and the 60/40 rule are all examples of why players should be protected by the antitrust laws.

The department of Justice has consistently advocated the elimination of baseball's antitrust immunity. As Deputy Assistant Attorney General Lipsky told the House Subcommittee on Monopolies of the House Judiciary Committee on July 14, 1981:

"It has been the position of the Antitrust Division for some time that baseball's exemption is an anachronism and should be eliminated. * * * I know of no economic data or other persuasive justification for continuing to treat baseball differently from the other professional team sports, all of which are now clearly subject to the antitrust laws."

The Players Association shares the view of the Department of Justice that the federal courts have sufficient flexibility in the context of a "rule of reason" antitrust analysis to take into consideration any special circumstances that may be present in baseball. If baseball's owners cannot demonstrate the reasonableness of their actions, they should be required to conform with the public policy expressed by the antitrust laws.

Finally, baseball's owners frequently argue that antitrust coverage is not needed because they act in the public interest. I submit that the contrary is true—that baseball's owners have acted only in their own selfish interest. But, in any event, it is not up to the owners to define the public interest. That responsibility lies with Congress, and Congress has determined that the antitrust laws further the public interest.

II. USE OF SPECIAL-PURPOSE ANTITRUST EXEMPTIONS

While baseball is the only industry and certainly the only professional sport whose owners enjoy a blanket exemption from the antitrust laws, there have been a

number of special provisions exempting certain activities of professional sports from those laws.[5] In the last two years, numerous bills have been introduced to allow leagues to restrict the movement of sports franchises, allow for "revenue sharing" and for other purposes through the device of exempting the leagues from the antitrust laws.

Current law does not prohibit professional sports teams and leagues from regulating themselves in a reasonable manner consistent with the antitrust laws. The "rule of reason", to which professional sports teams and leagues are subject, takes into account the special characteristics of each industry and allows practices which are commercially reasonable and not anti-competitive in the context of that industry.[6] For example, the Eighth Circuit in the *Mackey* case [7] noted that certain restraints on player movement might pass muster under the antitrust laws. And, indeed, reasonable league restrictions have been upheld even in club relocation situations.[8] Those cases demonstrate that the laws are flexible enough in their application to accommodate the special circumstances of the sports industry.

Retreat from the protection of the fundamental national economic policies favoring competition which are found in antitrust laws, even in nominally narrow areas, should not be lightly undertaken. The result of using special-purpose exemptions from the antitrust laws would be to create a mantle of protection filled with holes. Rules drafted by the owners pursuant to the exclusions would inevitably affect more than the intended area. For example, a set of rules to protect student athletes might also restrict negotiations or fix prices. Indeed, under the guise of carrying out the purpose for which the exemption was created, the law might be used to shelter activity totally outside the intended scope of the rule. Such exemptions would be difficult to police and would lead to confusion and uncertainty. In light of the complications which the exemption would produce, we do not believe that any of the witnesses have met the heavy burden of showing that a retreat from such an important national policy is warranted.

Our second concern with respect to the use of special purpose antitrust exemptions is that, within the scope of such an exemption, the owners' actions are completely removed from external scrutiny. Senator Specter has properly pointed out that permitting rules which encourage a student athlete to complete his education (as in S. 610) will restrict the athlete's right to seek and obtain employment with an employer of his choice, located in a city in which he desires to live, and at the time of his choice—a right which other citizens enjoy and value very highly. Application of the "rule of reason" under the antitrust laws helps to ensure a balance between those competing interests and provides a mechanism whereby that balance may be reviewed. By contrast, an exemption from the antitrust laws for an owners' draft leaves no effective check on the owners' activities.

Finally, evisceration of the antitrust laws should not be undertaken unless it is clear that there are no alternative means to accomplish the desired result. Where, as here, the objective of legislation is to encourage athletes to complete their education, there would appear to be a number of alternative methods which would be useful: delayed or contingent contracts, pre-signing or post-retirement scholarships, tuition assistance during the off-season, career counseling and job placement services for players and prospective players, special extension courses provided by the leagues and scheduled around or during the season, to name a few. Some of these programs exist now in primitive form. Others await only the action or approval of the owners. Some or all of these programs can be of assistance in encouraging athletes to finish their education. We would respectfully submit that there are alternatives to advance the objective of S. 610 and, therefore, the use of an antitrust exemption is unwarranted.

In short, use of special purpose exemptions from the antitrust laws as a means of encouraging completion of education may not produce the desired result and, indeed, may result in abuse by the owners and uncertainty on the part of both the industry and the public.

III. THE BASEBALL OWNERS' AMATEUR DRAFT SYSTEM

Operating under their exemption from the antitrust laws, the baseball owners developed a system which regulates the acquisition of amateur players. A review of

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[5] See, 15 U.S.C. SS 1291-1295 (league sales of sponsored telecasting rights and the NFL-AFL merger).

[6] See, e.g. *Smith* v. *Pro Football League*, 593 F. 2d 1173 (DC Cir. 1978) and cases cited therein.

[7] *Mackey* v. *NFL*, 534 F. 2d 606 (8th Cir. 1976), cert. denied, 434 U.S. 801 (1977).

[8] See *San Francisco Seals Ltd.* v. *NHL*, 379 F. Supp. 966 (C.D. Cal. 1974).

the owners' system may be useful to demonstrate some of the dangers in pursuing the objectives of S. 610 through manipulation of the antitrust laws.

Prior to 1965, professional baseball clubs competed with each other for quality amateur players. Clubs bid against each other, and top prospects frequently received substantial signing bonuses, advantageous contracts, scholarships and other considerations.

Under the owners' system, a player may be drafted by only a single professional club. The club which drafts the player is given the exclusive right to negotiate with and sign the player. If the player wants to play but is either dissatisfied with the club which has drafted him, or is unhappy with the contract offered, he is stuck—no other baseball club is permitted to sign, negotiate with or otherwise discuss potential employment with the draftee. The player's only choice is to refuse to play and to wait until the next draft, six months later. The player can take a chance that a new team might choose him and offer him a more attractive package. The player's choice under baseball's draft system are to sign with the team which owns the rights to him or to give up a career in professional baseball. As one might expect, the economic leverage—unless you're John Elway and play two sports—is almost all one-sided.

The owners' system contains elaborate rules which nominally encourage athletes to continue their education. However, the practical effect of those rules which are summarized in our statement, while the baseball rules may appear to offer restrictions to encourage athletes to finish school, it is clear that because of the numerous exceptions, they do not do so. The net result is that no one's interests are protected adequately by the draft system except the owners', and they are "protected" only from competing with each other.

In conclusion, the Players Association believes, based on its experience, that exempting from the antitrust laws rules to encourage amateur players to complete their education will not ensure a proper balancing of the competing interests involved. Indeed, such an exemption will virtually ensure that the owners adopt the most self-serving rule and will remove any necessity for the owners to justify the reasonableness of the rule.

In a larger sense, the Players Association believes that the activities of baseball and of all professional sports should be subject to the antitrust laws. Those laws offer a sufficiently flexible standard of reasonableness to accomodate the special circumstances of professional sports. Those circumstances do not justify exempting the professional sports industry from coverage of the same laws by which the rest of the society is governed, either on a blanket basis, such as the baseball owners enjoy, or for limited purposes such as those set forth in S. 610.

While the objective of S. 610 is laudable, the Association believes that the mechanism put forward to achieve it would be, for the reasons discussed, a move, both philosophically and practically, in the wrong direction.

Senator SPECTER. I would like to call our final witness, Mr. Richard Dull, director of athletics of the University of Maryland.

Mr. Dull, we very much appreciate your being here. Chairman Thurmond regrets he is not able to be here. He has other commitments and as President pro tem of the Senate he has the obligation to open the Senate which I think he is about to do and his other commitments require that he absent himself.

But we do welcome you here.

I note that you graduated from Bicklersville High in Pennsylvania and were Pennsylvania's high champion of the javelin in 1961 and Pennsylvania State Jaycee champion in 1963 which is quite a record and quite an achievement.

We note that and look forward to your testimony.

STATEMENT OF RICHARD M. DULL, ATHLETIC DIRECTOR, UNIVERSITY OF MARYLAND

Mr. DULL. Thank you.

I would like to extend my personal and professional appreciation to the committee for the oppor unity to appear.

I have a brief review of my statement.

Senator SPECTER. Your full statement will be made a part of the record, Director Dull, and we look forward to your summary.

Mr. DULL. The University of Maryland is one of the Nation's largest universities which has for many years sponsored a comprehensive intercollegiate athletic program, embracing 18 sports, governed by the NCAA. It is an educational institution whose students historically have been impacted by professional sports franchises contracting young men to forgo their educational objectives and limit their energies to professional participation in athletics. Because of my concern for this practice, I stand in support of the objectives and purposes of S. 610.

The signing of Herschel Walker is an occurrence that has widespread ramifications beyond its specific application to Herschel Walker. It serves as the precedent, its extension controlled solely by the future whim and disposition of professional owners, to prompt students who participate in the sport of football to depart prematurely from their college campus, just as has been the case, unfortunately, in the sports of basketball and baseball.

In order to fully comprehend the significance of the Walker signing, might I suggest we look at baseball and basketball as it has impacted the University of Maryland.

As you are aware, the *Spencer Haywood* decision in 1971 established the precedent which presently allows the National Basketball Association to draft college athletes. This practice in the last several years at the University of Maryland has seen the departure of Brad Davis, presently playing with the Dallas Mavericks and Charles "Buck" Williams, NBA rookie of the year in 1982, now playing with the New Jersey Nets.

In addition, Moses Malone, after signing a letter of intent with the University of Maryland in 1974, stayed on our campus just 1 day before joining a professional basketball team.

It is not my contention to you that any of these student athletes have suffered financially. None have yet to complete their degrees, however.

In the case of baseball, however, the established practice is more alarming. In baseball, major baseball franchises require that signers only be graduates of high school. In baseball at the University of Maryland, a sport which has experienced considerable success but not particularly noted for teams or players of national reputation, professional baseball franchises in 20 years have signed 19 of our players prior to their eligibility being completed. Seventeen of these student athletes were juniors, one a sophomore and one a freshman. Of the 19 players, only 7 have returned to Maryland to complete their degrees.

Most of you have heard of Ron Swoboda of baseball fame who had a very successful professional career. Without embarrassing and invading the privacy of the other 18 young men, I can state to you that most played professional baseball in the minor leagues with continuing and ultimate anonymity.

I stand in opposition to the present practice in both baseball and basketball, but the practice of baseball is most unnerving to me. In basketball, a sport utilizing just 5 players at a time, with squads less than 15 members, the premature departure of players from college generally affects only the superstars.

In baseball, however, where squad rosters are greater, and where baseball utilizes a vast network of farm teams and associated minor league teams, the practice affects not only the superstar but the average player as well. Bonuses to sign in baseball are measured by the tens of thousands of dollars, not the hundreds of thousands of dollars as is the experience of basketball.

I would suggest to you that if the Herschel Walker case becomes the rule, football will be like baseball. We will have a sport utilizing rosters in excess of 50 men, with another 50 who ultimately will have been cut or waived, with two leagues and 40 or more assorted teams bidding not only for the services of the superstar but for the average player as well.

Premature departure from college in pursuit of professional contracts may be beneficial to the Herschel Walkers and the "Buck" Williams and the Moses Malones and Ron Swobodas over the world.

My concern, however, is for that great body of young students who, at a very impressionable age, will be the recipients of several thousands of dollars provided them as a bonus and will in turn surrender their present and future aspirations educationally only to exhaust their financial resources and be left with nothing.

The action of the USFL now threatens students at our college institutions participating in their intercollegiate football, ultimately according them the same denial of educational advantage which has for so long marked the sports of baseball and basketball.

The opponents of this legislation have seen fit to attack college athletics. Their arguments, many based on erroneous facts and reaching erroneous conclusions, are irrelevant and not germane to the issue at hand.

The issue, in my humble opinion, is whether there is a substantial public interest in a policy to encourage student athletes to finish college before they avail themselves of professional opportunities in sport franchises.

I suggest to you this policy is not only in the best interest of the young men at my institution, but at all institutions within the framework of the NCAA. The initiation of congressional action in this area is not only praiseworthy but, in my opinion, is required as well.

Senator SPECTER. I thank you very much, Mr. Dull.

Mr. Dull, just a few questions.

Isn't the NCAA rule which would eliminate a collegian's eligibility for even negotiating with a pro team a somewhat unreasonable one?

Mr. DULL. In my opinion, I do not believe that one should have rules that they cannot enforce. The NCAA has a number of such rules and I would put the agentry rule in that category. Unless you are following the student athletes everywhere they go, I do not think we can find out when and where they are negotiating professional contracts. So, I think a more flexible rule would be in order.

Senator SPECTER. Aside from the issue of enforceability, isn't it tough to rule out a player's eligibility simply because he enters into some preliminary negotiation? There has been a suggestion in the Herschel Walker case, for example, that had he not been foreclosed from returning to Georgia, because he had entered into some

preliminary negotiation, he might not have made the deal with the Generals.

Mr. DULL. I find it a severe rule. I think that was the case of Herschel Walker, that in the event he had wished to stay at Georgia, he probably would have been rendered ineligible by the NCAA. In my opinion it is a bad rule.

4-YEAR RULE

Senator SPECTER. Director Dull, what do you think of the idea of a requirement which would make the colleges extend 4-year commitments to their athletes rather than the present year-to-year system?

Mr. DULL. I would support it. When I went to undergraduate school, they had such a rule, that your scholarship was for a 4-year period of time.

Senator SPECTER. Does the University of Maryland have that rule?

Mr. DULL. We have that rule. We have found that for several reasons——

Senator SPECTER. A 4-year rule?

Mr. DULL. No; a 1-year rule under the NCAA. Our practice is that when a young man signs with us, his scholarship is not revoked or rescinded for other than disciplinary reasons.

Senator SPECTER. So, the practical effect is to maintain a 4-year rule?

Mr. DULL. That is correct. A revolving door practice in the long run is not likely to benefit an institution. It becomes public and certainly is not going to help your recruiting in the future.

Senator SPECTER. Do you have an opinion about the bills introduced by certain legislators around the country that would recognize the de facto professionalism of college star athletes and make them university employees, providing at the same time they not be viewed as professionals but as students who are on teams who have some benefits, some minimum wage and that sort of consideration?

Mr. DULL. I would be opposed to those bills. There are, in fact, at this time a minimum wage consisting of room, board, tuition, books, and fees. I find that universities' athletic programs, in fact, are not businesses. They need to realize a profit in order to continue their activities. But the profit motive is not the reason that we exist.

Senator SPECTER. Director Dull, Mr. Bobby Knight, Indiana University's basketball coach, is reported to have stated that each school in the NCAA should only be able to give out the same number of scholarships as the number of seniors that had graduated from their programs and received their degrees the previous year.

What would your reaction to such a tight rule be, to encourage universities to encourage students to complete their education?

Mr. DULL. I think that is incumbent upon us. I would support that and I think most universities in the Nation would.

Senator SPECTER. Director Dull, thank you very much for being here.

Without obection, I am going to have marked as an exhibit and introduced into the record an article by Mickley Cioffi's Sports Line, "Specter Bill Good for Pros, College."

[The article referred to and prepared statement of Richard Michael Dull follow:].

SPECTER BILL GOOD FOR PROS, COLLEGE

The behind-the-scenes wheeling and dealing which brought football star Herschel Walker from the college campus to the professional ranks certainly created a rift between the collegiate coaches and the United States Football League.

While some of the strong talk against the new league has quieted down, measures are being considered to help alleviate the problem areas.

Sen. Arlen Specter, R.-Pa., has sponsored a bill to grant a limited antitrust exemption allowing professional leagues to adopt rules against the signing of underclassmen without the threat of being sued by the player. Passage of the bill would be beneficial to all involved.

Although the USFL said it was concerned about the possibility of facing a lawsuit from Walker if it didn't sign him, the league also knew it needed Walker's name to sell tickets. Instead of adhering to its own rule against signing underclassmen, the USFL flip-flopped on the issue and brought the Heismann Trophy winner into fold. (As it turned out, this is only one instance of the "rule as you go" policy adopted by the USFL.)

Two of college football's most respected coaches, Bo Schembechler of Michigan and Joe Paterno of Penn State, are the biggest boosters of Specter's bill.

"If we allow the signing of undergraduates, we are opening the door to unscrupulous agents," Schembechler said. For every Herschel Walker, there will be twice as many—no, five times as many—who will go and will be unsuccessful. You can ask any of the pros; an undergraduate player is not physically, mentally or emotionally ready to go into pro football."

Paterno elaborated on Schembechler's claim.

"Our concern is with he 19- or 20-year-old who is thrown into the open market. He is made to feel he is better than he is, and he gives up his college education.

"It's a two-way street. Herschel Walker is worth a couple of million dollars because college football enabled him to develop his skills."

The College Football Association also endorsed the Specter bill. A statement from the CFA says the association "may be in favor of even stronger measures" than what is included in the bill.

The entire matter is not clear-cut agreement, however.

NCAA President John L. Toner has said that "the present number of student-athletes who are tempted to sign (professional contracts) prematurely does not warrant the adoption of a national policy to prevent an individual from having that choice."

We think it does.

PREPARED STATEMENT OF RICHARD MICHAEL DULL

Mr. Chairman, members of the subcommittee, my name is Richard Michael Dull and I am the Director of Athletics at the University of Maryland, College Park campus. Maryland, as one of the nation's largest and most outstanding universities, sponsors a major intercollegiate athletic program under the auspices of the National Collegiate Athletic Association. It is an educational institution whose students have historically been impacted by professional sports franchises offering professional contracts to members of our student body either before their college athletic eligibility has been exhausted or before five years has elapsed since the original matriculation of the student. Because of my concern, I stand in support of the intent purposes, and ultimate enactment into law of S. 610.

The signing of Herschel Walker by the USFL prior to the exhaustion of his athletic eligibility is a matter of grave concern to educational officials throughout the United States. I share this concern in my capacity as Director of Athletics at the University of Maryland. This occurrence has widespread ramifications beyond its specific application to Herschel Walker, and will now prompt those students who participate in the sport of football to depart prematurely from this college campus just as has been the case in the sports of basketball and baseball.

Allow me to recite the experience of my institution with respect to basketball and baseball throughout the most recent score of years. As you are aware, the Spencer Haywood Decision in 1971 established the precedent which presently allows the Na-

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tional Basketball Association to draft college athletes with remaining athletic eligibility. This practice in the last several years at my institution has seen the departure of Brad Davis, presently playing with the Dallas Mavericks and Charles "Buck" Williams, NBA Rookie of the Year in 1982, now playing with the New Jersey Nets. In addition, Moses Malone after signing a Letter of Intent with the University of Maryland in 1974, stayed on our campus just one day before joining a professional basketball team. It is not my contention to you that any of these student-athletes have suffered financially. None, however, have yet completed their degrees.

In the sport of baseball, the major baseball franchises require only that the signers be graduates of high school. In baseball at our institution, a sport which has experienced considerable success but not particularly noted for teams of a national reputation, professional baseball franchises in twenty years have signed nineteen of our players prior to their athletic eligibility being completed. Seventeen of these student-athletes were juniors, one a sophomore and one a freshman. Of the nineteen players, only seven have returned to Maryland to complete their degree program. You have no doubt heard of Ron Swoboda of baseball fame, who had a very successful professional career. Without embarrassing and invading the privacy of the other eighteen young men, I can state to you, however, that most played professional baseball in the minor leagues with continuing and ultimate anonymity. Maryland is just one of hundreds of collegiate institutions which play baseball in this nation. I would suggest to you that there are thousands of men in this nation, who over the years, have suffered a similar experience as our own players.

With the number of football franchises presently existing in our nation utilizing playing squads of approximately fifty men, imagine the impact that the Walker case can have on college students who also participate in football.

Premature departure from college in pursuit of professional contracts may be beneficial to the Herschel Walkers and the Buck Williams and the Moses Malones and the Ron Swobodas of the world. These multi-millionaires are the exceptions, however. My concern, however, is for that great body of young students and sportsmen, who at an impressionable age were the recipients of several thousand dollars, provided them as a bonus, and in return surrender their present and future aspirations educationally, only to exhaust their financial resources and be left with nothing. The action of the USFL now threatens students at our college institutions, participating in intercollegiate football, ultimately according them the same denial of educational advantage which has for so long marked the sports of baseball and basketball.

For years, a "gentlemen's agreement" existed between the National Football League and the NCAA member institutions. This agreement remains in effect with the NFL today and was honored in the early days of the American Football League. This agreement was honored during the brief existence of the World Football League. Unfortunately, this agreement was cast aside and declared null and void by the USFL prior to the completion of the league's first game. I regard this as a tragic state of affairs for all young men in America, participating in major college football who do not possess the abilities of a Herschel Walker.

Testimony before this committee previously, relating to this matter, have made claims that simply are erroneous. The absence of a few football players does not dilute the television revenues available to member institutions. The loss of a superstar in the sport of football which utilizes 95 football scholarship athletes to play the game does not assure a losing season, a missed bowl appearance, less money for the school or maybe the coach's job. The University of Georgia will continue to have winning seasons, play in major bowls, and earn money through the sport of football. Likewise, I am certain and confident the employment of Coach Vince Dooley is not in jeopardy.

The argument has been advanced that the NFL has ignored the Haywood Decision and that NFL lawyers have made no effort to comply with the mandate of the Haywood Decision. I would suggest that any reading of the Haywood Decision should be more narrowly construed. It applies to the sport of basketball and its legal holding should not, and has not been, extended by any court to the sport of football. I would suggest to you that the NFL does not stand above the law of the land. Its position, is in fact consistent with the jurisprudence of our nation. It is likewise erroneous to suggest that Herschel Walker needed to leave college prematurely because he was destitute and without means to continue as a student. After all, he was the recipient of a full scholarship.

Prior testimony has justified the USFL action and the Herschel Walker decision by attacking the NCAA and its member institutions. They would suggest that intercollegiate athletics has no relationship to the educational process and is nothing

more than another form of American business. Not only do I take exception with this statement, but I would suggest to you that this is totally irrelevant to the issue at hand. But for the record, college athletics does not exist simply to realize a profit. Like any cause, regardless of its philanthropic purpose, its continued survival requires sufficient revenue to pay its bills. Every entity in American society, particularly the American household, exists under the same conditions. The issue, in my humble opinion, is whether there is a substantial public interest in a policy to encourage student-athletes to finish college before they avail themselves of employment opportunities with professional sports franchises. I suggest that such a policy is in the best interest of the young men and women at my institution, and at all institutions within the framework of the NCAA. The initiation of congressional action in this area in not only praise-worthy but is required as well.

Finally, it has been suggested by opponents of this bill that NCAA member institutions have not adequately educated young men who now play professional football. Statistics are cited that only 60 percent of the players in the National Football League did not receive their undergraduate degrees. Although I cannot state to you the accuracy of this information, I readily agree that all of us in intercollegiate athletics have had failings in the past. I concur that we need greater affirmative action in this area for the future. The opponents of S. 610, however, in citing what they regard as and unsatisfactory record seem to indicate that the response to this problem is to dilute the effectiveness of our efforts even further. In my opinion, legislation needs to be passed to assist us in succeeding, not legislation which would have to the effect of causing us to fail. S. 610 is not the total answer to the ills of intercollegiate athletics, it is a step forward however to protect those non-Herschel Walker football types, who will leave school prematurely, sign meager bonuses with the new football league, only to play several years or be injured, and never again be accorded the opportunity or possibly have the financial means to complete their college eduations. Their success and welfare, and the welfare of their families, require congressional notice, deliberation and action.

Senator SPECTER. That concludes all of our scheduled witnesses and the hearing.

On behalf of the Judiciary Committee, we thank you all for coming.

[Whereupon, at 12:05 p.m., the committee recessed, to reconvene subject to the call of the Chair.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

PREPARED STATEMENT OF PETE ROZELLE, COMMISSIONER, NATIONAL FOOTBALL LEAGUE

PROFESSIONAL FOOTBALL QUITE NATurally spawns tales of legendary heroes and historic games, some of which become larger than life as they are retold. Such tales are all part of the tradition that makes a major sport enjoyable. However, there are other stories—myths about how the NFL operates—that are wrong to begin with but are repeated over and over until some people actually believe them.

One of the most persistent of these goes something like this: *It's unfair to make players complete their college eligibility before the NFL will accept them; the only reason for this policy is to maintain the free farm system that the colleges provide.*

A frequent companion to that myth is: *When a player finally does get out of college he should be able to sign with any club he wishes; the draft is against the principles of free choice that this country cherishes.*

Let's examine these statements and see what's behind them.

Once in a while, a player comes along who is so good in the early years of his college career that fans, the news media, and people close to the player begin to question NFL eligibility standards.

"Why," I am often asked, "can't Tony Dorsett of the University of Pittsburgh [or Earl Campbell of Texas, Herschel Walker of Georgia, etc.] be treated like any other citizen? If a young man wants to quit school as a freshman or sophomore and go into his chosen profession, he should have every right to do so."

A little history is needed here to understand the NFL's position. In pro football's infancy, some people were concerned that the professional game—despite its limited popularity and lack of promise—might someday have a damaging effect on the college game. The NFL decided against raiding campuses.

No one compelled the league to do this. The NFL merely hoped that college and pro sports could live together in an atmosphere of harmony. We have seen over several decades that not only do the colleges support our policy of requiring a player to complete his collegiate football eligibility, but lawmakers agree with the idea, too. Congressional committees and various individual members of Congress have told us during my term as Commissioner that they urge continuation of the policy.

The NFL sticks to its eligibility rules because we've been urged to do so by

those who would be hurt most without them (the colleges) and by those who think the rules are reasonable (Congress). But beyond these considerations we also believe our rules work to the ultimate benefit of the players themselves. The longer a young person is exposed to formal education, the better chance that person will have in coping with life in general.

If a law were passed or a court decision rendered that required the NFL to accept underclassmen, we, of course, would abandon our current rules. We would continue to bring young men into the league through the orderly process of the draft, even though they hadn't completed their college football careers. The real losers would be the colleges and the players.

As for the notion that we have eligibility rules only to maintain a free farm system, I always point out that the NFL has absolutely no say in the administration of college programs—which is as it should be. If we ran our own farm system, we would hire the coaches, install pro-type offenses and defenses, and impose no entrance requirements or academic chores. From a strictly financial standpoint, the money used to run the farm teams would drastically reduce the amount available for bonuses to rookies who enter the NFL every year.

College football simply is not a free farm system for the NFL to use as it sees fit. As a matter of fact, some colleges use the NFL as a recruiting incentive for their programs, proudly listing the number of alumni who have gone on to participate in our League.

I noted earlier that there also is a myth concerning the draft. The supporting argument usually includes a non-football illustration of some sort: "A graduate engineer can work for any company that will hire him. Shell Oil doesn't draft him and prevent him from working for Exxon."

This is true and entirely reasonable. But Shell is not scheduled to "play" Exxon under conditions in which the league wishes millions of people to be spectators to the contest. Moreover, gasoline can be produced and offered to the public by just *one* oil company; if other oil companies go out of business, that does not affect those that survive.

The NFL produces entertainment. The quality of that entertainment—on radio, television, and at the stadium—serves the interests of everyone involved with professional football, including players, fans, communities in which NFL franchises operate, and local stadium authorities. We are convinced that a player's opportunity to play in a thriving league of 28 teams, one offering comparable employment opportunities at each location, not only serves player interests, but that it would not exist at all if it were not for the distribution of talent the draft makes possible.

It rarely makes sense to use an unrelated business context as a basis for an argument against a sports league's method of operations. In the unique world of sports, where the business of relationships, the needs, and the public interests are wholly distinct, you must look below the surface.

If an argument can't stand that kind of look, it qualifies as a myth and nothing more.

TESTIMONY OF A. HAMPSHIRE
SENATE SUB-COMMITTEE ON JUVENILE JUSTICE
COMMITTEE OF THE JUDICIARY

Mr. Chairman, it gives me a great deal of pride to submit for the Sub-Committee on Juvenile Justice records, the views of a person who is not nationally known, but a person, who, for the past twenty years, has spoken on matters related to the treatment of young men and women that participate in collegiate athletics. Allow me to state, Mr. Chairman, that I would never oppose any bill or law that would improve the treatment and well-being of our young people. My opposition to this bill is grounded in the deep-rooted tradition that all men and women have the right to life, liberty, and the pursuit of happiness. This bill would, in effect, deny young people these rights. This bill would discriminate against those who have special skills in one area and not those who have special skills in another area. For example, would this bill prevent a young man or woman that has superior skills in speech or writing and wanted to work for THE NEW YORK TIMES or THE WALL STREET JOURNAL from leaving college, because without him or her that college's journalism program would fall apart into irrevocable shambles? Is it accurate to assume, Mr. Chairman, that the total viability of any academic or co-curricular program is predicated on the talents of any one individual? I tell you that it is not.

This bill, as proposed, serves as a vehicle, Mr. Chairman, to address a picayune and insignificant emotional outcry by men who are primarily interested in winning football games at the educational expense of young students. Many of these men will be seated before you as the hearings proceed, Mr. Chairman, and when they become too old to coach, or when they turn boxer and punch-out a young man as did Woody Hayes, they will receive a yearly retirement income far greater than the annual earned income of 80% of the players they have coached!

Mr. Chairman, each branch of the military takes a significant percentage of our young people from colleges and universities every

year. Would this bill prevent the armed services from pursuing recruitment activities because the subsequent decrease in enrollment would destroy the stability of these institutions? Again, sir, no, it would not.

It is my opinion, Mr. Chairman, that this bill would serve a far greater purpose by addressing the tragic abuse that is inherent in many college and university athletic programs. This abuse manifests itself through the exceedingly lengthy field practice sessions which take hours away from academic study time, through the coaching meetings for special positions, and through the general team meetings. In toto, these various athletic meetings exceed the total weekly hours these students spend in formal math and English classrooms. All of these actions cut deeply into the most important time that these young men and women desperately need - the time to study!

It is the lack of compassion, concern, and uncompromising commitment on the part of many coaches which does more to cause young men and women to leave college, not the "big bucks" that a precious few will earn. I would like to recommend that no athlete spend more than 20 hours per week on and off the field, excluding official games and travel time. After all, this is the maximum number of work hours that federal law permits for students enrolled in the College Work-Study Program. Athletes should not be encouraged or required to do more.

Mr. Chairman, if this bill is to become a law, I would like to make the following recommendations: 1) the law should require colleges and universities to pay all tuition and fees for the remainder of an athlete's education if he or she has played for four years and has not completed the necessary course work for the baccalaureate. This is nullified, however, when an athlete signs a professional contract and makes the team. In addition, the program would have to relinquish one scholarship for each player that is still working toward his or her degree, yet is ineligible to play. 2) All colleges and universities

should be prevented from holding practices before the regular student body is scheduled to report for classes. 3) The sponsors, or the television stations, which air the weekly sports shows that feature the head coaches as the "stars", should be required to pay a portion of the show's revenues to the school represented in order to help fund the players' education since the tapes and films of these very players help to boost the show's ratings.

In conclusion, Mr. Chairman, please do not let this bill become a wedding band which continues to bind the schools and pros together in a cozy marriage relationship that rewards college coaches with professional coaching jobs and punishes the players with four years of service and no degree.

Alexander Hampshire

March, 1983

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March 11, 1983

The Honorable Strom Thurmond, Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Senator Thurmond:

Re: Collegiate Student-Athlete Protection Act of 1983

Thank you for extending to me an invitation to testify before the Senate Judiciary Committee on March 17, 1983, concerning the above-referenced legislation offered by Senator Specter.

Because of the demands on my time in the past several weeks, I am unable to provide you with a thorough and complete briefing of my feelings concerning the proposed legislation. However, I would like to use this letter to briefly advise you of my thoughts.

Accordingly, I have stated below what I consider to be the issues and my opinions concerning a proposed bill entitled "Collegiate Student-Athlete Protection Act of 1983."

I. Overreaction to the Herschel Walker Signing

It is clear to me that Senator Specter's introduction of a bill providing an antitrust exemption some five days after Mr. Walker's signing of a professional contract was based upon emotionalism rather than sound judicial thought. Many feel that Mr. Walker is the greatest college athlete to ever participate in college sports. His athletic talents are only surpassed by the character he has exhibited to all Americans. Some persons initially felt that his signing a professional contract prior to completing his college eligibility was a mistake. However, as is always the case when all the facts are revealed, it is the overwhelming consensus of this country that Mr. Walker did the right thing.

I do not know Senator Specter personally but I am certain that he is a strong advocate and supporter of college athletics. If this assumption is true, we have a common bond because I am a product of college athletics and any success I have achieved in the representation of professional athletes originated as a scholarship athlete, a college basketball official, a part time administrator/supervisor of officials, a founder of one of the first refereeing training programs in the country, and an avid sports fan. In spite of my great loyalty and feelings toward college athletics, I recognize a greater ideology known as the American free enterprise system.

II. Special Interests Legislation

It is my opinion that any American, when advised that legislation is being considered that falls in the category known as "special interest legislation," feels it must be closely scrutinized. By definition, "special interest" means that a small sector of our society will be receiving preferential treatment which very likley could be to the detriment of the majority. Obviously, there are unusual circumstances that exist where special interest legislation is necessary for our system to work.

In the present case, the need for an antitrust exemption as proposed in Senator Specter's bill simply does not exist.

The great American institution known as college sports has been and is at an all time economic high. It represents a multi-million and possibly a billion dollar industry that has served the needs and desires of young prospective athletes, college alumni, sports fans, and many other interests. College sports is in fact one of the biggest industries in our great country. It has operated on this successful note for many many years, long before Mr. Walker came on the scene, and it will operate just as effectively now that Mr. Walker has joined the professional ranks. The institution known as college sports is far bigger than one individual.

III. Prior Involvement of Professional Sports with College Underclassmen

Professional sports, for many years, has offered opportunities to college underclassmen without any major concern of the federal government. Specifically, John McEnroe, one of the nation's greatest tennis players, left Stanford University early in his college career without any clamor from Washington. Wayne Gretzky, hockey's greatest star, never went to college in that he signed a professional contract out of high school and instantly became a super star. Robin Yount, baseball's Most Valuable Player, without the aid of a college education, has become a multi-millionaire by using his athletic talents on the baseball field. Bobby Clampett, a bright young golfing star, left BYU without fanfare following his junior year. Basketball stars such as Isiah Thomas, James Worthy, Magic Johnson, and many others have left their respective colleges with the encouragement and blessings of their coaches when it became obvious that their talents had reached a level of marketability that "no one" could turn down the opportunities of professional sports.

If professional sports was and is good for all of the individuals mentioned above, then the question must be asked, "How is Herschel Walker's situation different?" Obviously, it is not. Mr. Walker's contract has a value triple that of the above mentioned athletes. The United States Football League acknowledged that Herschel should be given the same equal rights that other young American athletes have been given for many years. The United States Football League should be admired, not condemned, for failing to participate in the hypocrisy of their competitor, the National Football League.

IV. The Real Issue at Hand

In my judgment, it appears that the sentiment of this country is that Herschel Walker made a decision while a junior at the University of Georgia to climb another mountain.

He had achieved at the college level the stature of being "the greatest college football player ever." He made a decision that his personal happiness was now found in being a professional athlete. It was time to climb another mountain and attempt to become "the greatest football player ever." The reward for this decision was a contract securing both his and his family's financial future. What a fortuitous catastrophe!

The real issue at hand was would the institution of college football continue to make millions of dollars in revenues from television rights, gate receipts, program sales, and all the other sources of income through the use of Herschel Walker's talents, or would Herschel Walker himself now have the opportunity to individually receive the financial rewards for the God given talents he possesses.

V. Conclusion

Although Senator Specter's bill, on the surface, has a most meritorious motive in that it appears to be an attempt to encourage student athletes to complete their college education, the potential dangers and harm of granting antitrust exemptions to special interest groups far outweigh the motives of this bill's draftsman.

With all due respect to this body, when you have successfully balanced the budget; when you have resolved the complex problems of the judicial system; when the Social Security system is made fiscally sound so that the elderly along with the current work force will know that benefits will be paid; when the threat of nuclear attack has been eliminated; when the minorities of this country can have equal opportunities with all other Americans so that they can, with a degree of certainty, fulfill the American dream without being athletes who run with a football, shoot a basketball, or hit a baseball; when all of these problems are resolved then I feel that maybe you gentlemen should take a look at college sports and the effect that professional sports has on its operation.

I am enclosing copies of a few newspaper articles I have received which tend to support the contentions stated herein--that the Herschel Walker matter was in the best interest of all concerned.

I look forward to being with you next week and answering your questions.

Respectfully submitted,

Jack Manton

John P. Manton

JPM:nbp

Enclsoures

The NFL Draft Eligibility Rule, the Labor Exemption and the Antitrust Laws: In the Matter of Herschel Walker

(By Robert A. McCormick and Matthew C. McKinnon)

INTRODUCTION

Each season there are a number of extraordinarily talented athletes whose ability to play professional football before their college eligibility expires is undisputed. The most recent and dramatic example of this phenomenon is Herschel Walker.[1] Virtually every superlative has been used to describe his athletic ability. He has been described as the perfect football machine, the ultimate merger of movement and might.[2]

The eyes of the sporting world fell upon Walker when he was still in high school.[3] As a college freshman at the University of Georgia, his accomplishments continued to multiply.[4] At the conclusion of the 1980 season—Walker's first as a collegian—United Press International declared him the "National Back of the Year" and he was named first team All-American by every association acknowledging such achievements.[5] In 1981, Walker's sophomore season, his achievements mounted and records continued to fall.[6]

After Walker's junior year, he was awared the Heisman Memorial Trophy as the nation's outstanding collegiate player for 1982.[7] With one year of college eligibility remaining, Walker had alredy garnered ten N.C.A.A. records and was third on the all-time N.C.A.A. rushing list.[8]

Although Walker's value as a professional is difficult to estimate, he could unquestionably command an annual salary of several hundred thousand dollars.[9] Walker, however, has one major obstacle: No one in the National Football League (N.F.L.) will hire him.[10]

Under NFL rules, the only players eligible to be drafted are those who will have graduated by the following September 1st, or those who have either exhausted their college football eligibility or who first entered college at least five years earlier.[11] While Walker is therefore excluded from the draft and subsequent employment, he must also live with the ever-present danger of disabling injury that would preclude a professional career.[12] It has been said of the position Walker plays that, "[r]unning back, after all, is just a Faustian bargain: The devil only gives you so many years before he demands your knee cartilege.[13] The spectre of injury to Walker is apparent: "If the shoulder injury doesn't become chronic, . . . he stands to become the richest rookie in the history of the NFL."[14]

The NFL's eligibility rule dates from the 1920's.[15] At one time, the League stated that the rule was adopted to provide for competitive balance.[16] Today it appears to be more of a mechanism for maintaining a de facto farm system for the League that assures well-seasoned players for the draft.[17] By these rules, however, the owners of the clubs have, in our judgment, combined and conspired to restrain competition for Walker's services in flagrant violation of the antitrust laws. The obvious effect of the strictures is to deny Walker and similarly situated college stars the opportunity to earn a livelihood in their chosen profession. It is the most restrictive rule of its type in professional sports and is devoid of legally cognizable justification.

This Article's purpose is to examine professional football's draft eligibility rule under the antitrust laws. Preliminarily, however, it must be observed that the NFL's rule under scrutiny here has been made part of the; collective bargaining contract between the owners, negotiating on a multi-employer basis, and the player's union.[18] In order to accommodate goals which are central to national labor policy, many collectively bargained terms which would otherwise violate the antitrust laws if unilaterally imposed by employers are accorded immunity under the labor exemption to the antitrust laws.[19] Therefore, it must be initially determined whether agreement by labor and management over the draft eligibility rule exempts it from antitrust interdiction under the labor exemption. We first examine the application of the labor exemption doctrine to the rule since, if the exemption is applicable, then no further inquiry into the restraints imposed by it is warranted.[20] Because we conclude that the labor exemption does not immunize the draft eligibility rule under these circumstances, this Article next examines the rule under substantive antitrust principles. By our lights, the draft eligibility rule presents a clear violation of the antitrust laws and, if challenged by Walker or another similarly situated athlete, should be struck down as illegal.

Footnotes at end of article.

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II. Application of the labor exemption to the league's rule

There's some authority in labor and antitrust law that certainly gives the union the right to bargain about the rights of potential employees.[21]

National labor policy seeks to promote collective bargaining to resolve important employer and employee concerns.[22] Because, as we shall describe, many agreements between labor and management also serve to restrain competition within the omnibus language of the Sherman Act,[23] a judiciary created exemption—the so-called labor exemption—has been fashioned to compose inherent conflicts between national labor and antitrust policy and to save from antitrust interdiction labor-management agreements over issues of central importance to labor.[24]

As we have mentioned, the League's draft eligibility rule has been made a part of the collective bargaining contract between the N.F.L. clubs and the players' union.[25] Additionally, the issue of potential employees' access to employment opportunities is, under some circumstances, a subject of substantial importance to unions and may constitute a mandatory subject of bargaining under the National Labor Relations Act (N.L.R.A.).[26] Thus, a provocative and important argument can be made that those national policies which promote collective bargaining and protect certain union activities also serve to immunize this contractual term from antitrust scrutiny.

The labor exemption to the antitrust laws has been a significant issue in virtually all modern antitrust challenges to player restraint systems.[27] Moreover, it has been invoked in recent cases by sports leagues to successfully parry antitrust attacks by players on the various player restraint schemes.[28] Exploration of the labor exemption defense is critical because if the exemption is available to the League in this situation, then inquiry into the economic justifications for the restraint or the extent of the injury suffered becomes immaterial.[29] Furthermore, the framework in which the labor exemption is presented in this situation raises difficult questions about the nature and scope of the doctrine. As a result, we conclude that an in-depth analysis of this exemption is necessary for a full appreciation of our thesis.[30]

A. Overview of the Labor Exemption

The primary purpose of antitrust legislation is to promote freedom of competition in the marketplace.[31] On the other hand, the primary purpose of labor legislation, particularly as embodied in the National Labor Relations Act,[32] is to promote collective bargaining and to protect certain union or concerted employee activities.[33] Unions, however, are by their nature and purpose anticompetitive.[34] As the United States Supreme Court has repeatedly recognized, a central purpose of the labor movement is to reduce competition among employees regarding wages and conditions of employment.[35] The goal of eliminating competition among individual workers for wages and other employment terms is achieved by individual employees relinquishing their prior right to individually pursue an employment contract. The union becomes the exclusive representative of all employees on the assumption that through the pooling of strength and the threat of strikes and other concerted activity greater benefits for employees as a group will be exacted. Inevitably, this process produces standardization of employment terms for particular classes of employees.[36] As a matter of course, unions seek agreements with employers that establish uniform terms and that consequently limit the opportunity of any individual employee to sell his services on the most favorable terms.[37] Some employees will be better off as a result, while for other employees, such standardization will impair their ability to secure a better individual bargain.[38] Examples of union objectives with obvious anticompetitive effects are uniform wage rates, seniority systems and hiring halls. A standard wage rate, present in most industries with industry-wide union contracts other than the sports industry, results in a competitive disadvantage for more highly skilled workers who could command a wage greater than the standard rate. Seniority systems and hiring halls have a similar effect upon less senior but more highly skilled employees. Since unions and their proper objectives are inherently anticompetitive, if they are to be accepted and indeed protected, then restrictions on the free operation of the labor market must be tolerated.[39]

Agreements between employers and unions, then, are frequently "combinations in restraint of trade" within the literal language of the Sherman Act.[40] Nevertheless, case precedent firmly establishes that agreements regarding matters such as uniform wage rates, seniority systems and hiring halls are entirely permissable.[41] Indeed, in view of the fact that these matters normally constitute mandatory subjects of bargaining,[42] they are clearly matters about which national labor policy encourages agreement.

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The effort to compose these two important national policies has been left largely to the courts.[43] As the Supreme Court has crisply stated:

"[W]e have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other."[44]

The Supreme Court has now addressed the proper accomodation of these policies on several occasions. Although the specific contours of the labor exemption remain uncertain, existing Supreme Court precedent and lower court application of the labor exemption doctrine in cases challenging other aspects of the employment relationship, including the "reserve" systems in professional sports, show strongly that the interests protected by the draft eligibility rule are far removed from those which national labor policy clothes with immunity.

Although Justices[45] and commentators[46] have urged different formulations, in our view the reconciliation of national labor and antitrust policy in order to determine when any given labor-management agreement should be immunized, inevitably entails a balancing of the agreement's impact on competition against the importance of the employee interests at stake.[47] Under this calculus, the anticompetitive effects of the draft eligibility rule outweigh any countervailing employee interests. That is, the wholesale extinction of employment opportunities for an entire class of prospective employees occasioned by the draft eligibility rule substantially burdens competition[48] without advancing any important interest of active football players, as employees.

B. Role of the Labor Exemption in Sports Litigation

During the decade of the 1970's, traditional player restraints such as the draft,[49] reserve clauses[50] and free agent indemnity arrangements[51] were successfully challenged in all professional sports, save baseball,[52] by disaffected players who argued that such rules operated to restrain impermissably their ability to freely market their services.[53] In each case, the labor exemption was raised by the leagues in defense. The various leagues took the position that the putative restraint was the product of agreement between the employers, negotiating on a multi-employer basis, and the Player's Association as representative of all players, including plaintiffs. As a result, the leagues urged, the collectively bargained agreement should be shielded from subsequent attack by players whose representative had assented to the arrangement under scrutiny.[54]

Although the argument failed in *Flood* v. *Kuhn* [55] because of matters *dehors* this issue,[56] the various leagues sought to utilize the defense in the tide of litigation that followed.[57] Eventually a test emerged for the applicability of the labor exemption in cases challenging player restraints incorporated either directly or by reference into collective bargaining agreements. The standard was first set forth by the Eighth Circuit Court of Appeals in *Mackey* v. *National Football League.*[58] In *Mackey,* a group of active and retired N.F.L. players argued that the League's free agent indemnity system, known as the Rozelle Rule, operated to restrain players' ability to freely market their services.[59] The N.F.L. defended on the ground that the agreement was part of the collective bargaining contract [60] and that proper accommodation of federal labor and antitrust policy required that the agreement be deemed immune from antitrust interdiction.[61] As discussed elsewhere in this Article,[62] the court of appeals concluded that when evaluated under the Rule of Reason,[63] the indemnity rule could not be sustained.[64] More importantly, for our present purposes, the court also rejected the League's labor exemption defense.[65] In the court's view, the labor exemption would be available to the employer only in the event each element of the following three-prong test were met: [66]

First, the labor policy favoring collective bargaining may potentially be given preeminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship.

Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining.

Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.[67]

The application of the labor exemption to a collectively bargained indemnity system was most recently treated in *McCourt* v. *California Sports, Inc.*[68] The focus of this lawsuit was, once again, an "equalization" or free agent indemnity rule in-

cluded in the collective bargaining contract between the National Hockey League and the Player's Association.[69] Plaintiff hockey player had been assigned as compensation in accordance with this arrangement against his wishes. He challenged the indemnity rule under the antitrust laws. Again, the League argued that the labor exemption insulated its negotiated system from antitrust application. The Court of Appeals for the Sixth Circuit found for the defendant/League and, in so doing, specifically approved of and applied the standard for immunity set forth by the Eighth Circuit in *Mackey*.[70]

Because the standard has been accepted by the courts of appeal considering the question and because its application has been favorably received by commentators,[71] it is the logical starting point for our discussion of the application of the labor exemption to the N.F.L.'s draft eligibility rule. We turn, then, to discover the origins and limitations of each element of the *Mackey-McCourt* test because the contours of the labor exemption are vague rather than comprehensive. This vagueness makes a mechanical application of the aforementioned test improper.

Since the discussion ranges widely, however, it is appropriate that we initially set forth our conclusion. In our view, Supreme Court treatment of the labor exemption and basic principles of labor law make the elements of the *Mackey-McCourt* test, with limitations discussed *infra*, appropriate guidelines for the application of the exemption. The *Mackey* and *McCourt* formulations, in sum, provide a shorthand method for striking the balance between the importance of the subject matter to employee interests and its anticompetitive effects.

The draft eligibility rule fails each prong of the *Mackey and McCourt* standard. And, in the broader view, the anticompetitive effects of the draft eligibility rule far outweigh the interests to employees that the rule furthers. Therefore, the draft eligibility rule should not be accorded immunity from antitrust interdiction under the labor exemption.

1. The restraint on trade brought about by the draft eligibility rule does not primarily affect only parties to the collective bargaining relationship

The first prong of the *Mackey and McCourt* standard mandates that the impact of the practice under scrutiny fall primarily on the contracting parties before agreement on the matter will come within the labor exemption. The origin of this requirement is found in the teachings of United States Supreme Court precedent and particularly in *U.M.W.* v. *Pennington*,[72] *Allen-Bradley Co.* v. *Local 3, I.B.E.W.*[73] and *Connell Construction Co.* v. *Plumbers and Steamfitters Local 100*.[74] In each of these cases, the Supreme Court refused immunity to agreements between employers and unions notwithstanding that the agreement reached or concerned wages or some other matter of mandatory bargaining and was of central concern to employees and unions.

In *Pennington*, the union had allegedly agreed with major coal mine operators not to oppose rapid mechanization in their operations. The employer was to compensate the union for the resultant reduction in the labor force by an increase in employees' wages. The union also guaranteed to the large companies that it would impose the increased wage scale on smaller competing companies irrespective of those companies' ability to meet the greater wage demand. The Court concluded that this agreement, although directly concerning wages of employees and thus a mandatory subject of bargaining, was not within the labor exemption to the antitrust laws. The Court divided into three groups representing three Justices each. The opinion of Justice White, designated as that of the Court, acknowledged that an agreement between a union and an employer regarding wages was of central concern to the union and, normally, would be exempt from antitrust application.[75] The opinion further recognized the right of the union to make uniform wage demands upon employers if undertaken individually and on its own initiative.[76] The *Pennington* court, nevertheless, held that:

"One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes party to the conspiracy . . . [t]he policy of the antitrust laws is clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit."[77]

The defect in the arrangement in *Pennington*, then, was that the union bound itself with the major coal operators to impose demands upon persons not party to the collective bargaining relationship.

Support for this requirement may also be found in *Allen-Bradley*.[78] There, in a complex series of agreements, electrical contractors in the New York City area agreed with the union to buy equipment only from the manufacturers recognizing the local union. Further, electrical equipment manufacturers agreed to limit their sales to contractors also recognizing the local union. The effect of this arrangement

was a refusal to deal with nonsignatory electrical equipment manufacturers, such as the plaintiff. The agreement also excluded electrical contractors from competition for the New York area business. The Court concluded that the labor exemption would not save the obvious restraint on competition even though the union's purpose was to increase members' wages and employment opportunities: "[W]hen the unions participated with the combination of businessmen who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemption. . . . "[79] This phrase was quoted and emphasized by the Court in *Pennington* and thereby supports the viewpoint that an extra-unit focus by labor and management may remove an agreement from immunity.[80]

Finally, the Supreme Court's decision in *Connell*[81] supports this requirement. In *Connell*, the union sought agreements from general contractors that they would select only firms that were signatory to collective bargaining contracts with the union as subcontractors. The union, however, disavowed any interest in organizing the employees of the general contractors. The effect of this arrangement was to preclude non-union subcontractors from competing for jobs. Consequently, firms which might offer important price or quality advantages were precluded from marketing their services to the general contractor.[82] The direct market restraint on strangers to the relationship was an important factor in the Court's conclusion that the labor exemption was unavailable, even though, again, the goal of the union was to expand employment opportunities for its members.

In each modern Supreme Court case refusing immunity to labor management agreements, then, an important factor has been that the primary effect of the contract was to restrain parties who were strangers to the collective bargaining relationship even if the interest pursued by the union was of central importance to it and its members.[83] At the same time, when the anticompetitive effect of an agreement has fallen primarily upon the parties to the collective bargaining relationship, the Court has been willing to extend the exemption even to matters of arguably less concern to the union.[84] Thus, it is understandable that the courts have looked closely at whom the restraints of a labor-management agreement primarily effect and limit the application of the labor exemption only to those arrangements in which the restraint falls primarily on the parties to the relationship.

While this requirement is helpful, however, it constitutes an oversimplification. First, the line between internal and external effects is murky. Labor and management bargain and indeed are required to bargain upon demand over matters that frequently impinge upon the interests of strangers to the collective bargaining relationship.[85] For example, agreements limiting the employer's ability to subcontract work or introduce labor-saving devices, while sought by unions to preserve work for their members and frequently constituting subjects of mandatory bargaining,[86] may also severely limit the opportunity of third-party firms to do business with the contracting employer. Similarly, a most-favored-nations clause,[87] designed to protect an employer against competition from firms with lower labor costs, is also considered a mandatory subject of bargaining[88] and ought to be accorded immunity even though such arrangements have obvious external effects and serve to limit competition.[89] Finally, and most germane to our analysis, union hiring hall arrangements often serve to limit competition for employment.[90] They, too, are mandatory subjects of bargaining[91] and although such arrangements may have a dramatic impact on strangers to the collective bargaining relationship, the hiring hall can be clothed with antitrust immunity.

As is apparent, the internal-external distinction is not a wholly satisfactory one. Nevertheless, it can be said that those agreements which have, as their primary purpose or effect, the elimination of competition from strangers to the collective bargaining relationship, ought to fall outside the scope of immunity unless this impact is outweighed by some vitally important union purpose. The object of the N.F.L. draft eligibility rule, though it may preserve and prolong employment for current unit members, has, as its direct effect, the restraint of persons like Walker who, as yet, are strangers to the bargaining relationship without significantly advancing any important union goal. Restraining Walker from competing for a position on an N.F.L. team is the direct object of the agreement between the N.F.L. and the N.F.L.P.A. like the small mine operators in *Pennington*, the non-New York City manufacturers in *Allen-Bradley* and the non-union subcontractors in *Connell*. Walker, a stranger to the bargaining relationship, is the direct (and only) object of the restraint. Immunity, therefore, cannot be claimed.

2. The draft eligibility rule is not a mandatory subject of bargaining

The second prong of the test established in *Mackey* and *McCourt* requires that the particular player restraint under scrutiny be a mandatory subject of bargaining within the meaning of the N.L.R.A.,[92] before the agreement on the matter will be afforded immunity.[93] The basis for this requirement is grounded in the following principles: As a matter of logic, if one body of law—labor law—mandates negotiation regarding a particular matter, another body—antitrust—ought not condemn the fruits of that negotiation. Moreover, as a practical matter, such an outcome could serve to undermine the process of collective bargaining; concerns regarding potential antitrust implications of a given proposal would impede progress toward resolution of important employer or employee concerns. If a union or one of its members could successfully challenge a matter on which agreement had been reached, then the lesson learned would be that objectives won at the bargaining table might be later lost in court. The ultimate consequence would be a greater hesitancy to make concessions when the lawfulness of the *quid pro quo* was uncertain.[94] Finally, the statutory design of the N.L.R.A. places the union and the employer at the bargaining table and delineates the matters they either must, may, or may not discuss.[95] As to the substantive terms of the bargain, the parties are to be left on their own. As the Supreme Court has stated: "Within the area in which collective bargaining [is] required, Congress was not concerned with the substantive terms upon which the parties agreed."[96] Congress recognized that there are no absolute standards as to the reasonableness or propriety of bargained-for agreements[97] and that courts are particularly inappropriate forums for making such determinations.[98]

The requirement that the term under scrutiny must involve a mandatory subject of bargaining draws strength from Justice Goldberg's opinion, joined by Justices Harlan and Stewart, in *Pennington* and *Jewel Tea*[99] in which they flatly opined: "[T]he Court should hold that in order to effectuate Congressional intent, collective bargaining activity concerning mandatory subjects under the Labor Act is not subject to the antitrust laws."[100] Justice White's opinion, designated as that of the Court, also recognized the centrality of Goldberg's perspective, "[E]mployers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects."[101] The Supreme Court, however, has never embraced Justice Goldberg's per se approach but has, instead, weighed the importance to labor of the issue under scrutiny against its impact on trade.[102] The Court's refusal to accord an automatic exemption to mandatory subjects strongly suggests that the second prong of the test set forth in *Mackey* and *McCourt* is, in fact, somewhat broader and more flexible than their holdings connote.

We have concluded that the subject matter of the National Football League's draft eligibility rule is not a mandatory subject of bargaining and is, instead, a permissive subject.[103] Nevertheless, even if our characterization of the rule as a permissive subject of bargaining is wrong, a contrary determination that the matter falls within the area of compulsory bargaining would not result in automatic immunity.[104] At the same time, an inspection of the draft eligibility rule to determine whether it is a mandatory or a permissive subject of bargaining is an important inquiry under the *Mackey* and *McCourt* standard. More importantly, as we have argued, the issue of immunity ultimately turns on weighing employee interests against the impact of the agreement on competition. Determining the character of the subject matter as a mandatory or permissive subject of bargaining will reveal much about the relative importance of the issue to employees and therefore will greatly facilitate the balancing process.

3. The draft eligibility rule and subjects of bargaining

The N.L.R.A. obligates employers to bargain collectively[105] regarding wages, hours and other terms and conditions of employment[106] with "the representatives of his employees."[107] Together, then, these provisions extend the employer's obligation to bargain only to those subjects within the meaning of "wages, hours and other terms and conditions of employment" and only regarding the employer's "employees" in a "unit appropriate for such purposes" that the union represents.[108]

We conclude that, for two reasons, the draft eligibility rule is not a mandatory subject of bargaining. First, Walker is not an employee to whom an employer's obligation to bargain flows. Second, the subject matter itself, employment eligibility, is not within the definition of wages, hours and other terms and conditions of employment in this setting.

a. Walker is not an "employee" within the meaning of the NLRA

In *Allied Chemical Workers* v. *Pittsburgh Plate Glass*,[109] the Supreme Court addressed the breadth of meaning of the term "employee." The issue was whether the employer's unilateral modification of a health insurance program for retirees constituted an unlawful refusal to bargain. The Court first determined that retirees were not "employees" to whom the duties of the Act flowed.[110] In the Court's view, the legislative history of the Taft-Hartley Act dictated that the definition of the term "employee" should not be stretched beyond its plain meaning which included only those who worked for another for hire.[111] Further, the Taft-Hartley amendment made it clear that general agency principles were to be looked to at least in distinguishing between "employees" and independent contractors.[112]

Other important considerations support the narrow interpretation of "employee" and the conclusion that Walker, like the retirees in *Pittsburgh Plate Glass*, is not an "employee" within the meaning of the Act. A union is the exclusive bargaining representative only for the employees in an appropriate bargaining unit.[113] The breadth of an appropriate unit is limited by a well-established Board rule to those employees who share a "community of interest"[114] and will exclude those persons outside that community whose interests would be submerged in an overly large, and presumably unsympathetic, grouping.[115] In addition to finding the pensioners not within the meaning of "employee," the Court in *Pittsburgh Plate Glass* further concluded that active and retired employees "plainly do not share a community of interest broad enough to justify inclusion of the retirees in the bargaining unit."[116] In the situation of Walker, although prospective employees clearly have a co-existing interest in future wages and benefits with active unit members, as regards the matter at hand—entry barriers to employment—the interest of active and prospective players are diametrically opposed. Greater access to employment for prospective players will result in marginally less job security for active players. As a result, just as with the pensioners in *Pittsburgh Plate Glass*, Walker and other prospective employees are not, and could not be, appropriately within the same collective bargaining unit as active players. As a further result, Walker could not be eligible to vote in an election to determine the selection of a bargaining representative.[117] This denial of suffrage is critical for as the Court has pointed out: "[I]t would be clearly inconsistent with the majority rule principle of the Act to deny a member of the unit at the time of an election a voice in the selection of his bargaining representative."[118]

Since Walker is not an "employee" within the meaning of the Act, and could neither be included in a bargaining unit with active players nor vote for the selection of a bargaining representative, the duty to bargain on his "terms and conditions of employment" does not attach.

b. The draft eligibility rule itself is not a mandatory subject of bargaining under the NLRA

As shown earlier, the employer's duty to bargain goes only to those matters falling within the statutory formulation of "wages, hours, and other terms and conditions of employment."[119] While the Act does not immutably fix a list of subjects within the statutory requirement,[120] one may say that mandatory subjects characteristically must settle an aspect of the employer-employee relationship.[121] At the same time, permissive subjects fall into two groups; one group's primary characteristics are that the subject concerns the relationship of the employer to third persons and is traditionally considered within the prerogative of management.[122] It is beyond cavil that Walker is such a third person and the conditions upon which he may be hired are normally matters within the prerogative of management.

Nevertheless, as the Court observed in *Pittsburgh Plate Glass*, there are some important exceptions to the rule that "matters involving individuals outside the employment relationship do not fall within [the mandatory] category."[123] In each case in which an exception is found, however, it has been based upon a determination that in addition to involving parties outside the relationship, the issue also "vitally" affects the terms and conditions of employment of active employees.[124] Thus, in *Local 24 International Brotherhood of Teamsters* v. *Oliver*,[125] for example, the union and the employer negotiated a minimum rental fee that the employer would pay to truck owners who used their own vehicles in the employer's service and in place of the employer's own employees. Due to the direct and potentially devastating impact of an inadequate rental fee on the employees' job security, the Court concluded that the term "was integral to the establishment of a stable wage structure for [employees]"[126] and, consequently, a mandatory subject of bargaining. Similarly, in *Fibreboard* v. *N.L.R.B.*,[127] the Court held that a subcontracting provision which

replaced employees in the existing unit with those of an independent contractor to perform the same work under similar working conditions was a mandatory subject of bargaining. Again, however, the critical factor in determining whether the bargaining subject was mandatory was that the third party matter and employee job security were intimately and directly related.

In *Pittsburgh Plate Glass*, on the other hand, the Court found that the effect of pensioner's insurance benefits on active employees was too insubstantial to bring the issue within the collective bargaining obligation.[128] In the Court's veiw, the effect of pensioner's insurance benefits on the "terms and conditions of employment" of active employees was "hardly comparable to the loss of jobs threatened in *Oliver* and *Fibreboard*."[129] The Court further observed that the interests of active and retired employees might not be harmonious. Thus, although the union might find it advantageous to bargain for improvements in pensioner's benefits, it might nevertheless fine improvement of current income for active employees to be a more desirable objective.

In the matter of Walker, as we indicate, the draft eligibility rule erects an artificial obstacle to employment for Walker that incidentally benefits marginal players whose place on team rosters would be threatened by the rule's abolition. This, however, could hardly be said to "vitally" affect the terms and conditions of employment for unit members; not is it even remotely analogous to the wholesale loss of jobs for unit employees threatened in *Oliver* and *Fibreboard*. Indeed, the interests of current and prospective employees are, in fact, far more at odds than in harmony. It is, of course, possible that the N.F.L.P.A. would seek the removal of the rule. The far greater likelihood, however, is that the union would less vigorously represent the interests of persons not yet employed when those interests conflicted with the job security of active players.

The draft eligibility rule concerns the relationship between the employing clubs and persons outside the collective bargaining relationship without vitally affecting active players. Moreover, the interests of Walker and active players regarding the rule are antipodal. As a result, the draft eligibility rule does not come within the exception to the view that matters involving persons outside the employment relationship are permissive rather than mandatory subjects of bargaining. Being a nonmandatory subject, if fails the second prong of the *Mackey* and *McCourt* standard, and, comsequently, should not be immunized from antitrust interdiction.

It might appear obvious that Walker is not an employee and that the draft eligibility rule is neither wages, hours nor working conditions. We devote this lengthy inquiry into the nature of the subject matter, however, because under certain circumstance, persons outside the bargaining unit, including applicants for employment[130] and registrants at hiring halls,[131] are "employees" within the ambit of the Act. It is also true that hiring halls—that have the effect of regulating access to employment opportunities—are mandatory subjects of bargaining.[132] Therefore, an argument by analogy might be tendered that the draft eligibility rule constitutes a mandatory subject of bargaining that ought to be afforded immunity from antitrust scrutiny. While the matter is not wholly free from doubt, on balance, we conclude that the setting in which the draft eligibility rule arises is sufficiently different from those in which hiring halls exist that the subject matter of the rule does not constitute a mandatory bargaining subject. In the N.L.R.B. cases that held the Act to encompass prospective employees, it has been in the context of an employer's refusal to hire, or a union's refusal to refer for employment, rather than in the bargaining context presented here. As the Supreme Court has recognized, the extension of the Act's protection against discrimination to job applicants, "is an inevitable corollary of the principle of organization. Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply."[133] As we have shown, however, and as the Court recognized in *Pittsburgh Plate Glass*,[134] democratic principles underlying the Act preclude the representation aspects of the Act from attaching before an employee's actual hire.[135]

While it is also true that hiring halls frequently constitute mandatory subjects of bargaining, an argument by analogy that the draft eligibility rule also constitutes a mandatory subject of bargaining fails. In *Houston Chapter* v. *Associated General Contractors*,[136] the N.L.R.B. held that employment included the initial act of hire and that the hiring hall was a mandatory subject of bargaining. The N.L.R.B. stated that: "We do not deem the Supreme Court to have limited its definition of 'employees' to those individuals already working for the employer. Rather, the Court contemplated prospective employees as also within the definition."[137] Consequently, the Board extended the scope of mandatory bargaining to include matters directly affecting prospective employees. It must be emphasized, however, that the Board found it "highly significant" that the case arose in the context of the building and construction industry—"an industry characterized by intermittent employment which has received special statutory consideration."[138] Because employees are frequently laid off and rehired within the construction industry, active and prospective employees share a

strong mutual concern about opportunities for employment which are directly affected by the job priority standards established by the hiring hall.[139] The professional football industry is the antithesis of the construction industry in that employees are frequently employed by a single employer for the duration of their careers.[140]

The purpose of the draft eligibility rule is primarily to provide N.F.L. teams a farm system for the training of future players. This benefit inures solely to employers and provides no contemporaneous benefit to employees. The entire justification for hiring halls is grounded on their value in "eliminating wasteful, consuming, and repetitive scouting for jobs by individual workmen and haphazard, uneconomical searches by employees."[141] As a result, the justification for the extension of mandatory subjects of bargaining to encompass union hiring halls in the construction industry does not apply in professional football. Moreover, it is clear that most matters regarding the conditions precedent to the establishment of working conditions are not within the duty to bargain.[142] Accordingly, the N.F.L. rule does not come within the narrow exception to the rule that prehire matters are non-mandatory subjects of bargaining and falls short of the second prong of the *Mackey* and *McCourt* test. Any argument that the draft eligibility is sufficiently like the hiring hall to make bargaining over the subject obigatory ignores the fact that the hiring hall serves a unique and important function wholly unlike the function of the draft eligibility rule.

4. Bona fide, arm's-length bargaining

The third prong of the *Mackey* and *McCourt* standard requires that the restraint under scrutiny be a product of vigorous collective bargaining before immunity will attach. In both *Mackey* and *McCourt*, the critical factor was the extent that the free agent indemnity rule under challenge was the product of actual bargaining. In *Mackey*, as in this situation, the rule under scrutiny had been made part of the collective bargaining contract between the N.F.L. and the N.F.L.P.A. through incorporation by reference.[143] The League there argued, as it could be expected to in a challenge to the draft eligibility rule, that the rule's incorporation into the collective bargaining contract immunized its application from antitrust scrutiny. The *Mackey* court, however, determined that the Rozelle Rule was not, in fact, the product of "bona-fide, arm's-length bargaining."[144] The court reviewed the recent bargaining history and found that the rule remained unchanged since its unilateral implementation prior to collective bargaining.[145] It affirmed the district court's finding that the union had received no "quid pro quo" for the rule's inclusion in the collective bargaining contract.[146]

In *McCourt*, the district court noted that the terms of the challenged contractual provision were identical to a rule adopted by the owners three years earlier.[147] Therefore, the court concluded that the rule had been "unilaterally" included in the collective bargaining agreement, was not the product of bona fide arm's-length bargaining and would not come within the labor exemption.[148] The Sixth Circuit disagreed with the district court's characterization of the bargaining process. The court of appeals observed that the players' association had employed several bargaining tactics, including the threat of a strike and antitrust litigation[149] but had failed in its effort to alter the League's position on this issue.[150] Since the League had assented to other benefits in exchange for the provision under challenge, its inclusion in the agreement was the result of legitimate, albeit hard, bargaining.[151]

As regards the draft eligibility rule, the available evidence reveals that the rule, although incorporated by reference into the collective bargaining agreement, is not the product of actual give-and-take during negotiations.[152] This fact alone places the matter beyond the standard for immunity set forth in *Mackey* and *McCourt*. In addition, although the requirement of actual bargaining has not been a factor in Supreme Court review of the labor exemption,[153] it has been a critical determinant in antitrust challenges to reserve system components in professional sports.[154]

In *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*,[155] for example, a franchise of fledgling World Hockey Association alleged that the reserve clause, league affiliation agreements and other devices to control player mobility were violative of the antitrust laws. The district court, in finding for the plaintiffs,[156] gave careful attention to the extent of actual bargaining between the NHL and the Player's Association over the reserve system restraints under attack. The court observed that the matter had originally been inserted in individual player contracts before the advent of the players union. The court—while finding as a matter of fact that the arrangements under attack had been "discussed"—refused to conclude that it was a product of "collective bargaining."[157] Similarly, in *Robertson* v. *NBA*,[158] a group of professional basketball players again attacked components of the reserve system and the draft as impermissible restraints on trade. The League urged a two-prong standard for immunity: "(1) Are the challenged practices directed against non-parties to relationship if they are not, then (2) are they mandatory subjects . . . bargaining? If the answer to No. 1 is 'No' and to No. 2 'Yes,' the practices are immune . . . ."[159] The court opined that if the practices under scrutiny had been the subject of collective bargaining, then a subsequent agreement might have been insulated from antitrust interdiction. In this case, however, the court conclud-

ed there had been no tradeoff or exchange between the parties over the issues. The court embraced the same standard set forth in *Philadelphia World Hockey*, namely "[s]erious, intensive, arm's-length bargaining."[160]

It appears that the justification for the requirement of actual negotiations is twofold: First, actual bargaining is strong evidence that, in the end, the union considered and approved of the restraint:

"to the extent that a general principle emerges from the case *(Robertson)*, it seems to be the same point made by the court in *Philadelphia World Hockey*: the labor exemption will be applied only to those practices which have been approved by the union. The approval which is given must be more than passive acquiescence and be the product of serious, good faith bargaining."[161]

Given the origins of the doctrine as a protective device for unions, such a requirement has been thought necessary by reviewing courts.[162] Second, to the extent that the labor exemption doctrine has been extended to insulate collective bargaining agreements as well as union activities from antitrust review, the requirement insures that actual bargaining take place lest the doctrine be turned on its head and become a mechanism by which employers utilize a weak union to shield otherwise unlawful activities.[163]

In our view, however, the requirement of "actual bargaining" is fraught with danger and should be applied only in narrowly circumscribed situations. We submit that the distinction between discussion and bargaining is overly obscure to discriminate the licit from the illicit. The N.L.R.A., of course, requires that parties bargain in good faith over mandatory subjects of bargaining.[164] And, while the Board will outlaw disengenuous or "surface bargaining,[165] there is no requirement that parties modify original positions or otherwise make exchanges as to any particular matter.[166]

The particular posture under which the prior sports cases arose unquestionably contributed to the development of the requirement of "actual" bargaining. In all such cases, the employment terms under scrutiny antedated the establishment of a mature collective bargaining relationship between the owners and players. The unions were, relatively speaking, weak.[167] Later, when a component of the reserve system appeared in a collective bargaining agreement and was challenged by disaffected players, the teams sought a grant of immunity under the labor exemption. Courts were unwilling to permit the employers to use the union as a shield to protect them from clear liability for restraints which were, in effect, unilaterally imposed. Given the fact that the original purpose of the labor exemption was to protect unions and their legitimate organizational and collective bargaining activities, the prospect that the labor exemption doctrine might be used as "a cat's paw to pull the employer's chestnuts from the antitrust fires" [168] was an unsavory one for courts. Since the unions in professional sports have matured, however, there is less justification for the requirement of "actual bargaining" when the subject matter appears in the collective bargaining contract.[169] Moreover, there is considerably more reason to assume that if a matter appears in a collective bargaining contract, either directly or by reference, that it is the product of arm's-length bargaining.[170]

As a result, if bona-fide arm's-length bargaining were the only ground upon which the subject matter failed the test for the labor exemption, then we would be unable to find that the matter falls outside the area of immunity. Given our conclusion that the matter fails all three prongs of the standard, however, it remains one more piece of evidence supporting a conclusion that immunity is unwarranted. More importantly, given that the draft eligibility rule has not been subjected to actual negotiation, the question arises: What effect would vigorous bargaining between the N.F.L. and the N.F.L.P.A. have upon labor exemption applicability? In our judgment, the third prong of the *Mackey* and *McCourt* standard adds nothing to the necessary task of balancing employee interests against anticompetitive effects. Because the third prong of the standard is the least justifiable measure of labor exemption applicability, we conclude that even if the parties were to vigorously bargain over the draft eligibility rule, a subsequent agreement on the matter would not immunize the rule under the labor exemption. Inasmuch as the labor exemption is not available to save the draft eligibility rule from antitrust scrutiny, we turn to examine the rule under substantive antitrust doctrine.

III. The antitrust laws

The basic policy of the federal antitrust laws is to prohibit unreasonable restraints on economic competition.[171] One of the oldest and best established of these restraints is a contract which unreasonably forbids anyone from practicing his calling.[172] When an athlete is declared ineligible for the professional football draft, he is effectively prevented from practicing his trade.

The draft eligibility rule is only one of a number of player restraint rules which have been imposed upon professional athletes by the concerted action of team

owners. Many of these rules directly restrained competition for player services by impeding the free movement of players between teams.[173] Since these rules were the product of an agreement by the owners which seriously interfered with a players' ability to practice his trade, they were challenged as illegal under the Sherman Act. In most cases, the players successfully claimed that the rules were concerted refusals to deal or group boycotts, which unreasonably restrained competition for players services.[174] Since the N.F.L.'s draft eligibility rule is likewise a restraint on competition for the services of college athletes, it too is illegal if it unreasonably restrains competition. Any inquiry into the legality of the rule must begin with a review of the Supreme Court cases dealing with boycotts and concerted refusals to deal.

A. The Supreme Court—Boycotts and Concerted Refusals To Deal

While Section I of the Sherman Act,[175] if read literally, would condemn every type of concerted restraint of trade, the Supreme Court has interpreted the statute as prohibiting only undue or unreasonable restraints of trade.[176] This rule of reason as formulated by the Court left a good deal open to inquiry, and proved difficult and time-consuming to apply. Under the rule it is first necessary to perform an in-depth analysis of the facts of the case to identify the exact nature of the practice involved. Next the trial court is required to hear evidence concerning the purpose of the activity. If it is determined that the purpose of the practice was to limit competition, then it is declared illegal. If, on the other hand, it is determined that there is no anti-competitive purpose, the inquiry is not at an end. It is then necessary to assess the effect on competition. If the net effect of the practice is to lesser competition, then it is likewise illegal.[177]

It did not take very long for the Court to determine that there are certain types of agreements which have such a pernicious effect on competition that they can be conclusively presumed to be illegal without any elaborate inquiry into the precise harm which they caused.[178] This principle of per se unreasonableness has been applied to price fixing,[179] market divisions,[180] boycotts,[181] any tying arrangements.[182]

Whenever the Supreme Court discusses per se violations, it invariably mentions group boycotts and concerted refusal to deal.[183] The Court has been quick to condemn such restraints in language which implies that these arrangements are always a violation of the Sherman Act. In *Paramount Famous Lasky Corp.* v. *United States*,[184] for example, a group of film distributors agreed that they would include in every standard exhibitor contract a clause which required arbitration of all disputes. They further agreed that none of them would deal with any exhibitor who refused to agree to such terms. The Court rejected the industry's claim that the clause in its agreement requiring that there be no dealing with non-complying exhibitors was necessary to protect the industry against undersirable practices: "It may be that arbitration is well adapted to the needs of the motion picture industry; but when under the guise of arbitration parties enter into unusual arrangements which unreasonbly suppress normal competition their action becomes illegal." [185]

Similarly, in *Fashion Originators' Guild, Inc.* v. *F.T.C.* [186] when a group of manufacturers of women's clothing agreed to refuse to sell their products to any retailer who sold garments which had been copied from a member of its guild, the Court had no difficulty finding that such a practice was illegal.[187] The defendants' aim to protect themselves from allegedly illegal conduct was no justification. The Court held that "[u]nder the circumstances it was not error to refuse to hear evidence offered, for the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination." [188]

In *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*,[189] the Court reiterated that group boycotts or concerted refusals to deal could not be saved by allegations that they were reasonable.[190] In keeping with its rigid view regarding such practices, the Court has held that the agreement of a group of automobile dealers to encourage General Motors to stop selling to discount outlets was a classic conspiracy amounting to a group boycott and therefore per se illegal.[191]

Based on the above cases, it would seem that any concerted action by competitors, including a league's concerted refusal to draft a college football player constitutes a per se violation of the Act. There is, however, the possibility that under certain circumstances, an otherwise per se violation might be permitted if it comes within the so-called *Silver's* exception.

1. The Silver's exception

In *Silver* v. *New York Stock Exchange* [192] the court indicated that under certain circumstances a practice which would ordinarily be a per se violation of the Sherman Act might be permitted. While holding that the Exchange had violated the Sherman Act because it excluded a broker from access to its facilities without a hearing, the Court stated that "absent any justification derived from the policy of another statute or otherwise," [193] the action of the Exchange would be illegal per

se. This language implies that the Court has left the door open in certain types of self-regulatory schemes.

Whether the door is merely cracked or flung wide open, however, has been the subject of much debate. Some believe that *Silver* sets forth a very narrow exception mandated by legislative action.[194] Others read the case more expansively,[195] and have set forth the following three requirements:

(1) The industry structure requires self-regulation.

(2) The collective action is intended to (a) accomplish an end consistent with the policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary.

(3) The association provides procedural safeguards which assure that the restraint is not arbitrary and which furnishes a basis for judicial review.[196]

2. The rule of reason

In spite of the strong language used by the Supreme Court, there are numerous lower court decisions which have upheld various types of self-regulatory schemes which have the effect of a boycott.[197] A number of commentators have attempted to reconcile these cases with the Supreme Court's apparent hostility to all forms of concerted refusals to deal.[198] Alas, the explanations given for these decisions are almost as numerous as the cases themselves. Inasmuch as the rule is part of the professional football's draft and thus a self-regulatory scheme, it is necessary to venture into this legal "no man's land."

Professor Sullivan, for example, proposes that only classic boycotts should be per se violations while other forms of concerted action should be analyzed under the rule of reason.[199] A classic boycott occurs when a group of competitors seek to protect themselves from competition from non-group members by taking concerted action aimed directly at depriving their competitors of some essential trade relationship. For example, in order to drive a troublesome price-cutter out of the market, a group of automobile manufacturers might agree to stop buying steel from a supplier unless the supplier refused to sell its product to the non-group auto manufacturer.[200] Since under these circumstances the purpose is clearly anti-competitive, there is no justification for engaging in any extended factual analysis. The benefits from such arrangements are few, or none, and the dangers to competition are substantial. Thus, his approach is based on analyzing the purpose and effect of the agreement. If the purpose is anti-competitive, then it should be conclusively presumed to be illegal. If, on the other hand, the purpose of the practice is not to restrain competition, but its effect is anti-competitive, it should be judged under the rule of reason.

This apparently is true even if the boycott is also used to achieve a reasonable program of industry self-regulation. In *Silver* v. *New York Stock Exchange*,[201] for example, the Court rejected the use of a boycott as a means of self-policing. In holding that such action violated the Sherman Act, the Court stated that the reasons for the action were irrelevant.[202] The Court further stated that the boycott, if not exempt under the Securities and Exchange Act, would be a per se violation.[203]

On the other hand, there are arrangements which do not have the purpose of harming competition, but may nevertheless have the effect of a boycott. These are referred to as concerted refusals to deal.[204] In these cases, a group of competitors agree to take some concerted action which has the effect of excluding a non-competitor from the market place. For example, a group of soft drink manufacturers might agree to not use saccharin in their product. The effect of this arrangement is that none of the manufacturers will deal with the supplier of saccharin. This case, unlike the classic boycott, has neither the purpose nor the effect of the classic boycott, that is, to put a competitor out of business. Thus, in Sullivan's view, it should be judged by the rule of reason.

Another commentator using an approach developed by Professor Coons has taken a somewhat different view of the problem. According to this approach, the legality of the concerted action should be judged by whether its purpose is commercial, that is, motivated by pursuit of profit, or non-commercial.[205] If the group's purpose is commercial,[206] then it should be judged by the traditional rules which apply to boycotts. If, on the other hand, the group's purpose is noncommercial and is found to further a socially beneficial goal, then it should be upheld.[207] This approach appears to be unworkable in the present situation.

A group of non-competitors will always have only non-commercial purposes in mind when they engage in any concerted action. For example, a group of parents who agree to boycott an X-rated movie theatre are only interested in protecting themselves, their families and their neighborhood from the influence of the theatre. On the other hand, the purposes set forth by a group of competitors will generally be both commercial and non-commercial. For example, the N.F.L. will probably seek to justify the rule because it insures that each player will have an opportunity for a college education,[208] it promotes player safety[209] and that it is necessary to insure a pool of talented players for the League.[210] While the first two reasons are non-profit oriented, the third reason is basically economic in nature. Since the purposes

are a mixture of economic and non-economic reasons, this approach appears to break down since it offers no guidance as to how such a case should be handled. Moreover, even if this approach could be modified to deal with these cases it appears that the Supreme Court would not adopt this line of analysis for "non-commercial" schemes which are adopted by competitors.[211]

The rule-of-reason approach is nevertheless consistent with the view that professional football differs significantly from most other business ventures since the professional football clubs for most purposes are not competitors in the economic sense. In *Smith* v. *Pro Football, Inc.*,[212] the Court viewed the N.F.L. as basically a joint venture which provides an entertainment product, that is, football games and telecasts. Since this is the case, no club is really interested in driving any other club out of business because this would ultimately lead to the failure of the entire league. As a practical matter, the League may thus be closer in the legal sense to a profession than to a business venture.[213] If so, the League may be free to vary their practices from an absolute free market system. It should be noted, however, that in regard to player talent the teams are, in fact, competitors.[214]

The Supreme Court in *National Society of Professional Engineers* v. *United States*[215] has recently limited the scope of inquiry under the rule of reason by stating categorically that the rule, contrary to its name, "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint which may fall within the realm of reason,"[216] and that the inquiry must be "confined to a consideration of [the restraint's] impact on competitive conditions."[217] The purpose of antitrust analysis, the Court concluded, "is to form a judgment about the competitive significance of the restraint, it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by Congress."[218] When this language is coupled with the Court's statement that the "true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition,"[219] it appears that a group of businessmen could not justify their restrictive conduct on the basis of some non-economic benefit, e.g., the protection of the public health.

Relying on *Professional Engineers*, the D.C. Circuit in *Smith*[220] declared that the National Football League draft as it existed in 1968 was illegal. Using a rule-of-reason approach, the Court found that the draft was anti-competitive both in purpose and effect.[221] Since the purpose of the draft was to restrict competition among the N.F.L. clubs for services of college players, it was designed to limit competition. In addition, the draft forced each seller of football services to deal with only one buyer, thus robbing the seller of his bargaining power.

The D.C. Circuit Court rejected the League's argument that the draft was necessary to maintain competitive balance, stating that while it might help to maintain competition on the field, it did not increase competition in the economic sense of encouraging others to enter the market.[222] This being the case, the League's position boiled down to an assertion that competition in the market for entering players would not serve the best interests of the public, the clubs or the players themselves, and such justification was not permitted as a defense. The court held that *Professional Engineers* foreclosed such non-economic justification because a player draft can survive scrutiny under the rule of reason only it if is demonstrated to have positive, economically pro-competitive benefits that offset its anti-competitive effects, or at least accomplishes legitimate business purposes and has an insubstantial anti-competitive effect.[223]

The question of whether player restraints in general should be treated as per se illegal or judged under the rule of reason has recently received much attention. In light of the uncertainty embodied in the Supreme Court cases, it is not surprising that the sports cases have not produced a definitive answer.

Initially, courts were reluctant to apply the per se rule to the sports cases because of the industry's unique economic position.[224] These cases were followed by a series of decisions which looked more favorably on the per se approach.[225] It now appears that the pendulum is swinging back toward the rule of reason.[226]

While some authorities indicate that the approach used to analyze player restraints is immaterial, since "either path will lead to the same destination,"[227] this is not necessarily the case. In *Professional Engineers* the Court indicated that under the rule of reason, a restraint of trade could not be justified by reasons unrelated to the market place.[228] Thus, the Court rejected the association's attempt to justify its refusal to discuss prices as necessary to protect the public from poor engineering practices. If this approach to the rule of reason is used to determine the legality of the draft rule, then non-economic reasons such as insuring that young athletes receive a college education or player safety could not be considered.

On the other hand, if the *Silver's* exception is applied, then such non-economic reasons might be considered, since all that is required is that the collective action

(1) accomplish an end consistent with the policy justifying self-regulation; (2) is reasonably related to that goal; and (3) is not more extensive than necessary.[229] In *Silver's* the Court pointed out that protection of the public interest in safeguarding the investing public as well as the general confidence in the exchange would justify refusing to deal with an unreliable non-member.[230] Since it is uncertain which approach might be employed by a court in determining the legality of the draft eligibility rule, it is analyzed first using the per se test and then the rule of reason.

3. Per se illegality

There have been two professional sports cases outside professional football which have dealt with practices similar to pro football's draft eligibility rule. In both of these cases the courts used a per se approach. In *Denver Rockets* v. *All Pro Management, Inc.*,[231] Spencer Haywood successfully challenged the National Basketball Association rule which prohibited a qualified player from negotiating with any N.B.A. team until four years after his high school class graduation. The outcome was the same in *Linesman* v. *World Hockey Association*,[232] when a nineteen-year-old amateur hockey player challenged the World Hockey Association's (W.H.A.) rule which prohibited a player under the age of twenty from playing with any W.H.A. team.

In both cases, the same reasons were advanced for the rule. In *All-Pro*, it was first contended that the four-year rule was a more efficient and less expensive way to train young basketball players than a farm system. Second, the N.B.A. argued that the rule was a financial necessity to the League as a business enterprise, and finally the League contended that the rule was necessary to guarantee that each professional basketball prospect was given an opportunity to complete college.[233]

The court rejected the first argument stating that the case does not come within the *Silver's* exception since the N.B.A. rule made no provision for even the most rudimentary hearing before the rule as applied.[234] The absolute nature of the rule also troubled the court since it prohibited the signing of not only college players but also those who did not or could not attend college.[235] The court summarily dismissed the second contention stating that "even if this were true, it would not, of course, provide a basis for anti-trust exemption."[236]

With regard to the guarantee of a college education, the court felt that such a justification could not override the objective of fostering economic competition.[237] It is unclear what the court meant by this statement. If *Silver's* is truly an exception to the per se rule, then non-economic reasons which are consistent with the exception should be considered provided they are consistent with self-regulation. In *Linesman* the W.H.A. contended that the rule was necessary because it insured a pool of talented teenagers for the Canadian junior teams which developed players for the W.H.A.[238] Without the rule the Canadian Junior Hockey League would fail, since most talented teenagers would sign with professional teams. The court rejected these arguments stating that, "the anti-trust laws do not admit any exceptions due to economic necessity."[239] The court went on to observe that if professional hockey needed a training ground for its players, it should bear the cost of establishing a farm system.

With *All-Pro* and *Linesman* as a backdrop, the draft rule will now be analyzed to determine whether it passes muster under the *Silver's* exception. On its face the rule clearly is a concerted refusal to deal which restrains competition in the market for the services of college players. Unless it satisfies all three elements of the *Silver's* exception, it is illegal per se.

The first element of the *Silver's* exception is that the industry structure requires self-regulation. In the case of professional football, the policy justifying self-regulation is one of permitting rules, which because of the nature of the business, are necessary for the leagues to maintain a competitive balance and to function with reasonable efficiency. For example, some form of draft would seem to be necessary to insure that the richest and best teams do not acquire all the best players. There seems to be little doubt that the N.F.L., and by implication the U.S.F.L., has at least tacitly been given the right of self-regulation. While there is no legislative mandate for self-regulation, judicial approval abounds.[240] Thus, the first element of the *Silver's* test has been satisfied.

The second element of the *Silver's* exception is whether the rule furthers the goal of self-regulation. As in *All-Pro*, the leagues can be expected to argue that their rule is consistent with self-regulation since it is intended to insure that all prospective players at least have the opportunity to obtain a college degree since a professional football career is temporary at best.[241] it is difficult to imagine how the goal insuring a college education will accomplish any end consistent with the leagues' need for self-regulation. While encouraging young men to complete their college education is commendable, it does not aid in maintaining competitive balance[242] or in

protecting the leagues' integrity.[243] Moreover, even if it could be said that the rule does further some relevant goal, it is certainly more extensive than necessary. The rule applies to all players including those who do not want to go to college and those who are mentally or financially unable to do so.

Without college football there would be no organized system for the development of a pool of talented prospects. Since college players are the primary source of talent, it is necessary that the leagues maintain good relations with the colleges. The rule also benefits the colleges since many teams rely heavily on one or two athletes. Thus, the real reason for the rule is that as a practical matter the use of college-developed talent is a more efficient and less expensive way to train new players.

If the goal of the rule is to insure an uninterrupted flow of talent to the leagues so that they can efficiently engage in competition, then this end is consistent with the policy justifying self-regulation. This is even more true if, as in *All-Pro*, the leagues argue that their financial survival is at stake. What is unclear, however, is whether the rule is reasonably related to this goal. Considering the number of professional football teams (thirty-eight teams) it is unlikely that the loss of a few talented players from some college teams would have any great impact on college football. Certainly the loss of a superstar (e.g., Walker) by a school (e.g., Georgia) will have a more severe impact on the championship prospects of a particular team and thus cause a certain loss of goodwill.[244] The drafting of Walker by the U.S.F.L. has led to a great deal of animosity between the U.S.F.L. and the colleges.[244A] Nevertheless, it is unlikely that such "raiding" would lead to a destruction of college football since there are relatively few athletes who are capable of playing professional football without the benefit of four years of competition. Moreover, the elimination of the rule may also have the effect of restoring amateurism and academic excellence to college football. For many colleges, athletics is big business.[245] Many schools fiercely compete for star athletes who will fill their stadiums and coffers to overflowing. This mad pursuit of talent has led to many abuses such as paying college players[246] and admitting students who lack the motivation or intellectual tools to succeed academically.[247] If the rule were eliminated, then those athletes who are either unwilling or unable to attend college will be eligible to play professional football. Thus, some of the temptation for colleges to commit recruiting violations would be removed.

It should be noted that in *Linesman*, the court rejected this argument stating that "the anti-trust laws do not admit of exceptions due to economic necessity."[248] Yet, if *Silver's* truly allows for an exception to the per se rule, then the justification of economic necessity, provided it is consistent with the policy underlying self-regulation, should be permitted. As a practical matter, economic necessity will not be a serious issue in any case involving the N.F.L. and probably the U.S.F.L. It is unlikely that the signing of a few exceptional players will endanger the existence of college football.[249]

The leagues might also argue that the rule is necessary to protect a young player who has not yet reached full physical development. There is no question that football is a violent, dangerous sport.[250] Certainly, a rule protecting the safety of players would be an end consistent with a policy justifying self-regulation.[251] The rule, however, in its present form, is overly broad since it bars all players without regard to their physical prowess.[252] It is difficult to believe that any player with physical attributes similar to Walker, who stands six feet tall and weighs 220 pounds, is in any physical danger when he steps onto the playing field. If, in fact, there is concern for the safety of individual players, each candidate could be required to undergo an extensive physical examination prior to his eligibility for the draft.

The third element of the *Silver's* exception requires that the association provide procedural safeguards which assure that the restraint is not arbitrary and furnished a basis for judicial review.[253] A search of the N.F.L.'s Constitution and By-Laws does not reveal any provision which even remotely satisfies this requirement. To the contrary, the League rules give the commissioner "the power, without hearing, to disapprove contracts between a player and a club, if such a contract has been executed in violation of or contrary to the N.F.L. Constitution and By-Laws of the League . . ."[254] With one exception, the draft eligibility rule has been uniformly applied to exclude all prospective players.[255] Even in the one case in which a player was allowed to play before his class graduated, it was done because of an antitrust suit rather than under procedural rules established by the League.[256]

A lack of any procedural safeguards coupled with an almost rigid application of the rule is fatal. It was just such a situation which led the court, in *All-Pro*, to strike down an identical N.B.A. rule.[257] In response to the court's ruling, the N.B.A. adopted a "hardship rule"[258] which permitted the Commission to allow an athlete

who is suffering severe ecomomic hardship to be drafted prior to graduation. This rule was applied so liberally in the N.B.A. that, as a practical matter, anyone who merely claimed hardship was drafted. Finally, in 1976 the N.B.A. relaxed its eligibility standards so that any player whose high school class has graduated may become eligible for the draft simply by giving the League written notice forty-five days in advance of renouncing his college eligibility.[259] If the N.F.L. were to adopt a hardship rule it may still be too strict. In *All-Pro* the court stated:

"In addition, it is uncontested that the rules in question are absolute and prohibit the signing of not only college basketball players but also those who do not desire to attend college and even those who lack the mental and financial ability to do so. As such they are overly broad and thus improper. . . ."[260]

The court's statement implies that a draft eligibility rule may be applied to those who enroll in college, provided they may become a professional if hardship required, but may not be applied to those who elect not to be enrolled in college at all. Such a rule might make an unfair distinction between those high school graduates who decide immediately to turn professional and those that chose to attend college. In any event, the rule still would violate the antitrust laws since it would not satisfy the first and second elements of the *Silver's* exception.

4. Rule of reason

To justify its draft eligibility rule under the rule of reason the leagues would have to establish that the restraint merely regulates and perhaps promotes competition rather than suppressing it.[261] As stated previously, the court in applying the rule of reason will first look at the alleged restraint to determine whether it has any legitimate business purpose. It will then balance this purpose against the anti-competitive evils to ascertain whether the former outweigh the latter. A restraint is unreasonable if it has the net effect of substantially impeding competition.[262]

In most, if not all, of the prior litigation in which the N.F.L. was involved, the League argued that the restraint which it had imposed was necessary to insure competitive balance.[263] Generally, the courts have accepted this as a legitimate business purpose in light of the League's unique position.[264]

If, however, the courts follow the lead of the *Smith* decision, the competitive balance argument will be of little benefit. In *Smith* the Court stated that a restraint could only be justified if it was demonstrated that it had positive, economically procompetitive benefits that offset anticompetitive effects.[265] Or, in the alternative, if the League demonstrated that its rule accomplished some legitimate business purpose while having only an insubstantial anticompetitive effect then the rule would be upheld.[266] We have frankly been unable to construct any argument which would satisfy this version of the rule of reason.

The leagues might contend that the rule is necessary to protect its source of talented football players.[267] If college football were to be severely injured or completely destroyed by the elimination of the rule, the leagues' continued existence might be jeopardized. They would be faced with the alternatives of either investing huge sums of money to develop farm systems or drafting less experienced high school players. It appears, however, that no such dire consequences would flow from the abolition of the rule. There are over 1,700 colleges and universities in the United States, most of which have football teams.[268] The loss of a few extra players to the draft each year would have little impact. Since the N.B.A.'s draft eligibility rule was abolished in 1976, very few basketball players have joined the professional ranks prior to their college eligibility expiring.[269] Thus, while the rule is convenient for the League, it appears that its overall competitive benefits are slight. Moreover, elimination of the rule may go a long way toward restoring amateurism to college football. Each season college teams are penalized for recruiting violations, most of which involve paying students to play football.[270] If the rule is eliminated those players who are more interested in the financial rewards available as a professional could declare themselves eligible for the draft.

Moreover, even if competitive balance were a legitimate factor to consider in a rule of reason analysis, it is, however, far from clear how the four-year rule can possibly advance the cause of competitive balance.[271] Unlike the draft, which insures that weaker teams are permitted to select first so that they can obtain the best players, the four-year rule restricts all teams equally.

The draft eligibility rule has a severe anti-competitive impact on the market for player services. The career of a professional athlete is relatively short.[272] Thus, the loss of even one or two years of playing time can be very detrimental.[273] Moreover, if the player is forced to remain in college to play football there is the ever-present threat of incurring a serious injury that would end his career.[274] Finally, the fact that a player might compete in the Canadian Foodball League or some semi-profes-

sional league would not lessen the anti-competitive impact of the rule. Further, in *Smith* the court rejected the alternative of playing in the Canadian League, since the employment opportunities for American players are greatly limited due to the League's hiring preference for Canadian players, and the low salaries and few promotional opportunities.[275]

On balance, the rule is manifestly unreasonable. It bars all players, regardless of intelligence or financial capability, from playing professional football who were advancing competition in any significant way. Even if a hardship draft were instituted it is unlikely that it would withstand scrutiny since there are no real competitive benefits from the rule.

CONCLUSION

Professional football's draft eligibility rule is an unreasonable restraint of trade which cannot be legitimized by its inclusion in the collective bargaining agreement between the League and the players' association. The courts of appeal, considering the circumstances under which collectively bargained player restraints will be immunized under the labor exemption to the antitrust laws, have formulated a three-prong test for making this judgment. This test represents a shorthand method for balancing the anticompetitive effects of the rule against its importance to labor—a balance which must be struck in favor of labor for the exemption to apply. The draft eligibility rule, in its present form, fails each prong of this test. In the broader view, the anticompetitive effects of the rule far outweigh its importance to the players' association or its members and, therefore, tip the balance in favor of antitrust application.

Examined under substantive antitrust principles, the rule violates Section 1 of the Sherman Act since it unreasonably restraints competition for the services of talented young football players. If the rule is categorized as a group boycott, it is illegal *per se* unless the *Silver's* exception is applicable. The draft eligibility, however, is not subject to the exception since it is overbroad and does not further any goal or purpose reasonably necessary to the League's need for self-regulation. Furthermore, under existing procedures, there is no provision for any hearing for those players who wish to enter a league.

If the rule is analyzed under the Rule of Reason, as many courts have judged other player restraints, it also violates antitrust laws. On balance, the rule effectively denies an entire class of able amateur football players an opportunity to play professional football while aiding neither on-field nor off-the-field competition. There being no legally cognizable justification for it, the draft eligibility rule is unlawful.

Some may offer that the rule promotes college education or avoids the overreaching of young athletes. These, however, are not sufficient legal justification. And, given the current state of college athletics, it is doubtful that the rule has furthered these purposes. The disqualification of the rule, it is hoped, will lead to clearer distinctions between professionalism and amateurism and promote the keenly felt need for the latter in college athletics.

FOOTNOTES

[1] Walker is focused upon only as the prototype of a class of persons: Amateur football players whose services would be sought by professional teams but for the restraints of the National Football League's draft eligibility rule.

[2] Smith, *All Alone in the Open Field*, INSIDE SPORTS, September, 1981, at 22. Walker stands six feet, two inches tall, weighs two hundred twenty pounds and has been timed at ten and twenty-three hundredths seconds for the one hundred meter sprint making Walker among the two dozen fastest runners in the world. *Hershel Gets His Heisman*, TIME, Dec. 13, 1982, at 80. Coaches appear given to hyperbole in describing Walker. For example, University of Tennessee coach Johnny Majors described Walker as having "more going for him than any player who's ever played the game. He is something God puts on this earth every several decades or so." *Id.* Georgia Tech University coach Bill Curry said, "Herschel is just the biggest, fastest football player who ever lived." *Id.*

[3] Walker was the state high school champion in events as disparate as the shot put and the one hundred yard dash. He set national high school football records by scoring eighty-six touchdowns in his school career and forty-five in his senior year alone. That year he led his team to the Georgia state high school championship. He was a consensus high school All-American and Parade Magazine's national high school back of the year. Stories about efforts by colleges to recruit him are legion. *See, e.g.*, L. SMITH & L. GRIZZARD, GLORY, GLORY, 71-3 (1981).

[4] Walker gained more rushing yardage than any freshman in the history of the game. He finished third in the balloting for the Heisman Trophy—the first time a freshman had ever appeared in the top ten. He led the University of Georgia to a 1981 Sugar Bowl victory over Notre Dame, a game in which he was voted Most Valuable Player. Smith, *supra* note 2, at 29. Georgia also had an undefeated season and won its first national championship in 1981. Kirkpatrick, *More Than Georgia on His Mind*, SPORTS ILLUSTRATED, August 31, 1981, at 38, 44.

[5] Sporting News Sugar Bowl Media Guide, January 1, 1983, at 26. These associations are the Football Writers Ass'n (first freshman in history), Kodak (first freshman in history), Walter Camp, Associated Press and United Press International. *Id.* Walker's achievements in track and field were nearly as remarkable: He qualified for both the indoor and outdoor National Collegiate Athletic Association (N.C.A.A.) championships. Invitations to compete were extended to Walker from the prestigious Millrose Games, Martin Luther King Games and Drake Relays. He was the country's seventh fastest collegiate sprinter at the 100 meter distance in 1981 and was a member of the 1981 N.C.A.A. Outdoor All-American team. *Id.*

[6] Walker was the Associated Press "Back of the Week" on two occasions and United Press International's (U.P.I.) "Offensive Player of the Week" three times. Again a unanimous first team All-American, Walker was second in balloting for the Heisman Trophy. *Id.*

[7] Walker Finally Wins Heisman, Detroit Free Press, Dec. 5, 1982, at 2E, Col. 1.

[8] Sugar Bowl Media Guide, *supra* note 5, at 26-7.

Most Yards Rushing by a Freshman in One Season: 1,616 in 1980.
Most Yards Rushing by a Sophomore in One Season: 1,891 in 1981.
Most Yards Rushing in Three Seasons: 5,259 in 1980-82.
Most Games Gaining 100 Yards or More in One Season: 11 in 1981 (tied with 4 others).
Most Games Gaining 200 Yards or More by a Freshman: 4 in 1980.
Average Yards per Game by a Freshman: 146.9 in 1980.
Most Carries in Three Seasons: 994 in 1980-82.
Most All-Purpose Yards Gained by a Freshman: 1,805 in 1980 (1616 rush, 70 rec, 119 KO ret).
Most Seasons Gaining 1,500 Yards or More: 3 in 1980, 1981, 1982.
Most All-Purpose Yards in Three Seasons: 5,749 in 1980-82 (5,259 rush, 243 rec, 247 KO ret).

[9] Walker: It's Take the NFL Money, or Run, Detroit Free Press, March 13, 1982, at 1D, 5D. After completing only one year of college football, the Atlanta Falcon personnel chief said, "[i]f he had been available for the draft, he would have been the first player chosen." Smith, *supra* note 2, at 29. It was reported that Walker was offered $1,500,000 to $2,000,000 to sign a three-year contract with the Montreal Alouettes of the Canadian Football League. L. SMITH & L. GRIZZARD, *supra* note 3, at 192. This offer apparently prompted alumni of the University to attempt to start an insurance agency in Walker's name. The plan was vetoed by the N.C.A.A. *Id.* The seasoned player development chief for the Dallas Cowboys, Gil Brandt, was quoted as saying:

"Personnel people in the NFL are talking about him more than about any freshman I've ever seen. The obvious plan is to try to accumulate draft choices the year his class graduates [1984], and either hope you have the pick of the team that finishes last or have enough early picks so you can trade for it. Smith, *supra* note 2, at 29."

[10] At the same time, Walker and his family have not had an easy life. Herschel is the fifth of seven children of Willis and Christine Walker of Wrightsville, Georgia (pop. 2,100). When Herschel was born, his mother had to travel to Dublin—11 miles away—since Wrightsville had no hospital nor even a small clinic. For most of his life, Willis Walker worked on a farm for $20 per week while Christine earned $10 per week. After the seventh child was born, Mr. Walker gave up farming for work at a kaolin (chalk manufacturing) plant while Mrs. Walker took a job at a garment factory. Had Walker signed with Montreal, he could have shifted to the National Football League at age 22 when most players begin their professional careers and "stirred the grandest scramble in the history of human flesh." Smith, *supra* note 2, at 30. Walker did not want to go to Canada to ply his trade. "I don't think you should have to go outside your country to make a living anyway," he said. *Id.*

[11] NATIONAL FOOTBALL LEAGUE, CONST. AND BY-LAWS FOR THE NAT'L FOOTBALL LEAGUE, art. XII, § 12.1 and art. XIV, § 14.2 (1976).

The N.F.L. Constitution and By-Laws provide:

"The only players eligible to be selected in any Selection Meeting shall be those players who fulfill the eligibility standards prescribed in Article XII, § 12.1 of the Constitution and By-Laws of the League.

"National Football League Constitution and By-Laws for the National Football League, art. XIV, § 14.2 (1976);"

and,

"No person shall be eligible to play or be selected as a player unless (1) all college football eligibility of such player has expired, or (2) at least five (5) years shall have elapsed since the player first entered or attended a recognized junior college, college, or university, or (3) such player receives a diploma from a recognized college or university prior to September 1st of the next football season of the League. . . . *Id.*, art. XII, § 12.1(A)"

[12] In the 1981 Sugar Bowl game against Notre Dame, Walker was badly injured on his second carry. His left shoulder "subluxated" and he had to leave the game. It was the kind of injury that normally takes a player out of competition for three weeks. Kirkpatrick, *supra* note 4, at 45. Walker, however, returned to the game on Georgia's next series of plays. No runner had gained more than one hundred yards on Notre Dame all season. Walker was directed not to try to catch a pass, not to stiff-arm an opponent and to hold the ball only with his right hand. Even though he was severely injured, Walker carried the ball thirty times, gained one hundred fifty yards and scored two touchdowns to gain the 17-10 victory, the Most Valuable Player award and the National Championship for his team. *Id.* at 38.

[13] Smith, *supra* note 2, at 30.

[14] *Id.* at 34. The prospect of injury is such that before the 1981 season, Walker's father planned to take out a loan of $6,000 to $8,000 to secure a one-year, $500,000 policy insuring against injury. Id. at 32.

[15] Underwood, *Does Herschel Have Georgia on His Mind?* SPORTS ILLUSTRATED, March 1, 1982, at 24.

[16] During the 1960's, the better N.F.L. clubs drafted college players who, although not playing for their college teams in a given year, retained eligibility to play in a future year (so-called

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"red shirts") enabling dominant teams to stockpile future players. As a result, the League banned the drafting of red shirted college players until their college careers were actually completed. *Rights of Professional Athletes: Hearings on H.R. 2355 and H.R. 694 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 51 (1975) (testimony of Pete Rozelle, Commissioner, National Football League).

[17] Underwood, *supra* note 15, at 24.

[18] *See infra* note 25 and accompanying text.

[19] *See infra* notes 43–44 and accompanying text.

[20] J. Weistart & C. Lowell, The Law of Sports, 525 (1979).

[21] Underwood, *supra* note 15, at 24 (quoting Paul Weiler, Professor, Harvard Law School commenting on the draft eligibility rule).

[22] *See infra* notes 32–33 and accompanying text.

[23] 15 U.S.C. § 1–31 (1976). *See infra* note 40 and accompanying text.

[24] *See infra* notes 40–48 and accompanying text.

[25] The 1977 Collective Bargaining Agreement between the N.F.L. and the N.F.L.P.A. states in relevant part:

"Article I, Section . Full Force and Effect

"Any provisions of the . . . N.F.L. Constitution and By Laws . . . which are not superseded by this Agreement, will remain in full force and effect for the continued duration of this Agreement and, where applicable, all players, clubs, the N.F.L.P.A., the N.F.L. and the Management Council will be bound thereby."

[26] 29 U.S.C. §§ 151–69 (1976). Section 8(d) of the Act defines collective bargaining as "[t]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment." 29 U.S.C. § 158(d)(1976). Section 9(a) also declares that the union shall be the employees' exclusive representative "in respect to rates of pay, wages, hours of employment or other conditions of employment." 29 U.S.C. § 159(a)(1976). The phrase "wages, hours and other terms and conditions of employment," then, constitutes the issues about which the duty to bargain applies and matters which fall within this definition are mandatory subjects of bargaining. Beyond these areas, in so-called permissive subjects of bargaining, either party may refuse to negotiate and may implement decisions unilaterally. N.L.R.B. v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958).

[27] *See, e.g.*, Smith v. Pro Football, 420 F.Supp. 738 (D.D.C. 1976), *aff'd in part* and *rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978 (football); Mackey v. National Football League, 407 F.Supp. 1000 (D. Minn. 1975), *aff'd in part* and *rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 438 U.S. 801 (1947) (football); Robertson v. National Basketball Ass'n, 389 F.Supp. 867 (S.D. N.Y. 1975) (basketball); Kapp v. National Football League, *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) (football); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F.Supp. 462 (E.D. Pa. 1972) (hockey); Boston Professional hockey Ass'n v. Cheevers, 348 F.Supp. 261 (D. Mass.), 472 F.2d 127 (1st Cir. 1972) (hockey).

[28] Reynolds v. National Football League, 584 F.2d 280 (8th Cir. 1978). McCourt v. California Sports, Inc., 460 F.Supp. 904 (E.D. Mich. 1978), *vacated*, 600 F.2d 1193 (6th Cir. 1979).

[29] See *supra* note 20 and accompanying text.

[30] There has been a wealth of scholarship addressing the doctrine of the labor exemption to the antitrust laws. The focus of this Article is upon the application of the doctrine to negotiated player restraint systems in professional sports generally and the N.F.L. draft eligibility rule particularly. A partial list of important writings on the doctrine includes: Boudin, *The Sherman Act and Labor Disputes* (pts. 1 & 2) 39 Colum. L. Rev. 1283 (1935), 40 Colum. L. Rev. 14 (1940); Cox, *Labor and Antitrust Laws-A Preliminary Analysis*, 104 U. Pa L. Rev. 252 (1955); Handler & Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 Colum. L. Rev. 459 (1981); Meltzer, *Labor Unions Collective Bargaining and the Antitrust Laws*, 32 U. Chi. L. Rev. 659 (1965); St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603 (1976); Sovern, *Some Ruminations on Labor, the Antitrust Laws and Allen Bradley*, 13 Lab. L.J. 957 (1962); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 Yale L.J. 14 (1963).

[31] *See infra* note 171; N. Pac. Ry. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."); Allen Bradley Co. v. Local 3, I.B.E.W. 325 U.S. 797, 806 (1945) ("[Antitrust policy] . . . seeks to preserve a competitive business economy. . . . "); L. Sullivan, Handbook of the Law of Antitrust 14 (1977) ("The purpose of the antitrust laws is to promote competition and to inhibit monopoly and restraints upon freedom of trade in all sectors of the economy to which these laws apply."). *See also* Fried & Crabtree, *Labor*, 33 Antitrust L.J. 38 (1967).

[32] 29 U.S.C. §§ 151–69 (1976).

[33] Congress' intent to protect unions and encourage collective bargaining is strongly established in the following excerpt from the preamble to the Act:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. 29 U.S.C. § 151 (1976) (N.L.R.A. § 1)."

The N.L.R.A. further provides that employees have the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." 29 U.S.C. § 157 (1976).

[34] In short, unionization, collective bargaining and standardization of wages and working conditions are inherently inconsistent with many of the assumptions at the heart of anti-trust policy." A. Cox, D. Bok & R. Gorman, Cases and Materials on Labor Law 872 (9th ed. 1981). "From the outset, the difficulty in applying the antitrust concept to organizd labor has been that the two are intrinsically incompatible. The antitrust laws are designed to promote competition, and unions, avowedly and unabashedly, are designed to limit it." St. Antoine, *supra* note 30, at 604.

[35] "This Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards." *U.M.W.* v. *Pennington*, 381 U.S. 651, 666 (1965).

[36] Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L. J. 1, 9 (1971).

[37] It is a fundamental tenet of labor law that the rights of an individual must yield to those of the group. The Supreme Court has observed:

"But it is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group . . . we find the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive or surmout collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages."

J.I. Case Co. v. N.L.R.B., 321 U.S. 332, 338 (1944). *See also*, H. Wellington, Labor and the Legal Process 130 (1968); J. Weistart & C. Lowell, *supra* note 20 at 549.

[38] Jacobs & Winter, *supra* note 36, at 9–10; J. Weistart & C. Lowell, *supra* note 20, at 562.

[39] "We have long since concluded that the value of having unions in our society makes them worth promoting. Having made that judgment, we must be prepared to abide some of the consequences." St. Antoine, *supra* note 30, at 631.

[40] It is clear, however, that Congress' primary purpose in enacting the Sherman Act was to deal with business monopolies and restrictive trade practices, not trade union activities. Apex Hosiery v. Leader, 310 U.S. 469 (1940). Indeed, a genuine question exists as to whether Cogress intended the Act to apply to groups of employees at all. "On the basis of the Congressional debates . . . it is believed that no valid evidences can be found in the records of the legislative proceedings that Congress intended the Anti-trust Act to apply to labor organizations." E. Berman, Labor and the Sherman Act 51 (1930). *See also*, Boudin, (pt. 1), *supra* note 30, at 1285–87.

[41] *See, e.g.*, Pennington, 381 U.S. 665–66.

[42] *See*, The Developing Labor Law, (C. Morris, ed. 1971) 389–90, 405, 407–409; U.S. Gypsum Co. 94 N.L.R.B. 112 (1951) (seniority systems as mandatory subjects of bargaining); Houston Chapter, Associated General Contractors, 143 N.L.R.B. 409 (1963) *enf'd* 349 F.2d 449; *cert. den.* 382 U.S. 1026 (1966) (hiring halls as mandatory subjects of bargaining).

[43] Judicial review of Congressional efforts to create an antitrust exemption for labor has limited the statutory exemption to specific unilateral union activities including secondary picketing and boycotts. United States v. Hutcheson, 312 U.S. 219 (1941); Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 621–22. Handler & Zifchak, *supra* note 30 at 470. Negotiated agreements between unions and employers, therefore, are not subject to the statutory exemption. *Pennington*, 381 U.S. at 662. As early as 1941, however, the Supreme Court, recognized in *Hutcheson* that accommodating antitrust and labor policy required that some labor-management agreements be accorded a non-statutory exemption from the antitrust laws. *Connell*, 421 U.S. at 622–3. As Justice Goldberg observed, to do otherwise would permit unions and employers to conduct industrial warfare but prohibit a peaceful resolution to their dispute. Local 189 Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 679, 712 (Goldberg, J., dissenting).

[44] Allen Bradley Co. v. Local 3, I.B.E.W., 325 U.S. 797, 806 (1945).

[45] *See, e.g., Pennington*, 381 U.S. at 657 (Goldberg, J., dissenting) and *Jewel Tea*, 381 U.S. at 676 (1965) (Goldberg, J., concurring). Justices Harlan and Stewart joined Justice Goldberg in *Pennington* and *Jewel Tea*. Under these Justices' view, the labor exemption should automatically immunize any labor-management agreement governing mandatory subjects of bargaining. *Id.* at 697–726.

[46] Professor Sovern, for example, has urged that labor abuses be addressed not through Sherman Act application but "within the framework of our labor legislation." Sovern, *supra* note 28, at 963. Professor Winter has argued in favor of a legislative approach to regulating abuses arising from labor-management agreements. Winter, *Collective Bargaining and Competition: The Application on Antitrust Standards to Union Activity* 73 Yale L. J. 14, 66–73 (1963). Professor Handler and William Zifchak have urged a similar approach. Handler & Zifchak, *supra* note 28, at 514 and n.303.

[47] As Professor Meltzer has observed, "[w]hether any particular demand is exempt depends on weighing the interest in competition against the competing interests of the employees." Meltzer, *supra* note 28, at 724. Justice White, in his opinion in *Jewel Tea*, also remarked: "The crucial determinant is not the form of agreement . . . but its relative impact on the product market and the interests of union members." 381 U.S. at 690 n.5.

[48] *See infra* note and accompanying text.

[49] The draft is the mechanism by which entering players are allocated to teams, usually in reverse order of the selecting team's standing the prior year. The most hotly contested element of the draft has been the exclusive, perpetual right of the drafting team to negotiate for the drafted player's services. *See e.g.*, Smith v. Pro Football, 420 F.Supp. 738 (D.D.C. 1976), *aff'd in part* and *rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978); Robertson v. National Basketball Ass'n. 389 F.Supp. 867 (S.D. N.Y. 1975). *See also*, Pierce, *Organized Professional Team Sports and the Anti-*

trust Laws, 43 CORNELL L.Q. 566, 603 (1958); Note *The Battle of the Superstars: Player Restraints in Professional Team Sports*, 32 U. FLA. L. REV. 669, 670 (1980).

[50] Reserve systems were characterized by a perpetual right in the employing club to renew the contract of the player and were enforced through no-tampering agreements. J. WEISTART & C. LOWELL, *supra* note 20, at 506. *See* Rottenberg, *The Baseball Players' Labor Market*, J. POL. ECON. 242, 245 (1956) (blacklisting arrangement).

[51] Indemnity arrangements among teams insure that if a player leaves a club which employs him to play for another team within the league, then the original team will be compensated in the form of a player, draft rights or money. League by-laws frequently provide that if the former and the acquiring team cannot agree on the type or amount of compensation the former team should receive, then the determination would be made by the league commissioner. In essence, the compensation is a forced trade. These arrangements have produced considerable litigation. For a discussion of the operation of indemnity arrangements, *see Mackey* v. *National Football League*, 407 F.Supp. 1000 (D. Minn. 1975), *aff'd in part* and *rev'd in part*, 543 F.3d 606 (8th Cir. 1976), *cert. denied*, 438 U.S. 801 (1977); Robertson v. National Basketball Ass'n, 389 F.Supp. 867 (S.D. N.Y. 1975); Kapp v. National Football League, 390 F.Supp. 73 (N.D. Cal. 1974), *aff'd* 586 F.2d 644 (9th Cir. 1978) *cert. denied*, 441 U.S. 907 (1979). In these cases, players claimed that the forced compensation schemes operated to discourage prospective employing club owners from hiring available players and, therefore, restrained player mobility. *See* H. DEMMERT, THE ECONOMICS OF PROFESSIONAL TEAM SPORTS 38 (1973).

[52] Since Justice Holmes' decision in Fed. Baseball Club of Baltimore v. Nat'l League of Professional Baseball Clubs, 259 U.S. 200 (1922), baseball, alone among professional sports, has operated under a judicially created exemption from the antitrust laws. This exemption has engendered a great deal of comment and criticism. *See, e.g.*, L. SOBEL, PROFESSIONAL SPORTS AND THE LAW, at 66–72 (1977); Comment, *Baseball's Antitrust Exemption: The Limits of Stare Decisis*, 12 B.C. IND. AND COMM. L. REV. (1971); Berry & Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls and Strikes*, 31 CASE W. RES. L. REV. 685, 729 & n. 129 (1981); Comment, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418 (1967). *See also, House Subcommittee on Study of Monopoly Power*, H.R. Doc. No. 2002, 82nd Cong., 2nd sess. (1952).

[53] *See, e.g.*, Mackey v. National Football League, 407 F.Supp. 1000 (D. Minn. 1975) *aff'd in part* and *rev'd in part*, 543 F.2d 606 (8th Cir. 1976) *cert. denied*, 438 U.S. 801 (1977) (football), Smith v. Pro Football, Inc., 420 F.Supp. 783 (D.D.C. 1976), *aff'd in part* and *rev'd in part* 593 F. 2d 1173 (D.C. Cir. 1978) (football); Robertson v. National Basketball Ass'n, 389 F.Supp. 867 (S.D. N.Y. 1975) (basketball); Denver Rockets v. All-Pro Management, Inc., 325 F.Supp. 1049 (C.D. Cal. 1971) (basketball); Philadelphia World Hockey, Inc. v. Philadelphia Hockey Club, Inc. 351 F.Supp. 462 (E.D. Pa. 1972) (hockey); McCourt v. California Sports, Inc., 460 F.Supp. 904 (E.D. Mich., 1978) *vacated*, 600 F.2d 1163 (6th Cir. 1979) (hockey).

[54] This argument was presaged by a 1971 Yale Law Journal article by Michael Jacobs and Professor Ralph Winter. *See* Jacobs & Winter, *supra* note 28. The authors argued that certiorari had been improvidently granted in Flood v. Kuhn, 407 U.S. 258 (1972). Curt Flood had been traded by the St. Louis Cardinals to the Philadelphia Phillies without consultation and against his wishes. Major League Rule #9 stated that: "Upon receipt of written notice of such assignment" the player is "bound to serve the assignee." In Paragraph 6(a) of his Uniform Player Contract, Flood had argued that he could be so assigned.

Flood's first and most important cause of action complained that the reserve system violated the Sherman Act. Jacobs and Winter, however, argued that:

"For years the impact of antitrust principes on the arrangements allocating players among teams in professional sports has been hotly disputed. Now recent events seem to have brought this issue to a head. A malaise among good athletes like Curt Flood has increased the tempo of litigation. . . . we enter this crowded arena not to solve the antitrust dilemma, but to put it to rest. For, in the form in which it is generally debated, it is an issue whose time has come and gone, an issue which has suffered that modern fate worse than death: irrelevancy." *Id.*

[55] 407 U.S. 258 (1972).

[56] The Court acknowledged in *Flood* that the narrow definition of interstate commerce it utilized in *Federal Baseball* had so broadened in the intervening years that any exemption could no longer rest upon a finding that the baseball industry was not engaged in interstate commerce. The Court, however, refused to find baseball within the antitrust strictures, reasoning that Congress had failed to remove the exemption in the fifty years since the *Federal Baseball* decision. *Flood*, 407 U.S. at 285. The decision has been widely criticized. See *supra* note 52.

[57] *See* note 27–8 and accompanying text *infra*.

[58] 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 438 U.S. 801 (1977).

[59] The players also claimed that the draft, the standard player contract, the option clause and the no-tampering agreement constituted impermissable anticompetitive practices of the defendants.

[60] The 1968 contract between the player's association and the National Football League incorporated by reference the N.F.L. constitution and by-laws of which the Rozelle Rule was a part. The 1970 agreement, though not referring to the rule directly, did require that all players sign the standard player contract. That contract, in turn, provided that the player agreed to comply with and be bound by the league constitution and by-laws. Further, representatives of the parties testified that it was their understanding that the Rozelle Rule would remain in effect during the term of the 1970 agreement.

[61] 543 F.2d at 612.

[62] *See infra* note and accompanying text.

[63] *See infra* notes 174–5 and accompanying text.

[64] The district court had found the rule unlawful as a *per se* violation of the Sherman Act. As to this point, the court of appeals reversed the lower court.

[65] 543 F.2d at 615. This appeal provided the first occasion for a federal court of appeal to consider the immunity issue in the context of professional league sports. J. WEISTART & C. LOWELL, *supra* note 20, at 575.

[66] In applying this test, the court of appeals specifically rejected a finding by the district court that the labor "exemption extends only to labor or union activities and not to the activities of employers." 543 F.2d at 612 discussing the district court's finding at 407 F.Supp. at 1008.

[67] 543 F.2d at 614–15 (citation omitted). In *Mackey*, the court concluded that the indemnity arrangement affected only the parties to the agreement, and that although it was technically an arrangement among owners, it operated to restrict a player's mobility and depressed player's salaries. *Id.* at 618–19. Accordingly, the court concluded that the rule was intimately related to wages and thus constituted a mandatory subject of bargaining under the N.L.R.A. *Id.* at 615. It was on the third prong of the test that the N.F.L.'s defense faltered. The appellate court found that substantial evidence supported the lower court's finding that there had not been "bona-fide arm's-length bargaining over the Rozelle Rule . . ." and that the simple acceptance of the rule by the union did not serve to immunize it. *Id.* at 616.

[68] 460 F.Supp. 904 (E.D. Mich., 1978) *vacated* 600 F.2d 1193 (6th Cir. 1979).

[69] 460 F.Supp. at 906. This rule was similar to the Rozelle Rule but provided that the decision regarding compensation was to be made by an independent arbitrator and not by the commissioner. Like the N.F.L.'s four-year rule, the N.H.L.'s indemnity rule was contained in a league by-law that had been incorporated by reference into the standard player contract which was signed by the player and approved by the Players' Association.

[70] 600 F.2d at 1198. As in *Mackey*, the court concluded that the restraint imposed by the indemnity arrangement affected primarily the parties to the agreement, constituted a mandatory subject of bargaining and, unlike *Mackey*, was a product of arm's-length bargaining. In this, the Sixth Circuit Court of Appeals rejected the district court's finding that no arm's-length bargaining had occurred because there had been no movement by the owners on that issue.

> [T]he trial court failed to recognize the well-established principle that nothing in the labor law compels either party negotiating over mandatory subjects of collective bargaining to yield on its initial bargaining position. Good faith bargaining is all that is required. That the position of one party on an issue prevails unchanged does not mandate the conclusion that there was no collective bargaining over the issue. *Id.* at 1200.

[71] *See, e.g.*, J. WEISTART & C. LOWELL, *supra* note 20, at 582. Note, *Labor Exemption to the Antitrust Laws, Shielding an Anticompetitive Provision Devised by an Employer Group in its Own Interest: McCourt v. California Sports, Inc.* 21 B.C.C.L. REV. 680, 681 (1980).

[72] 381 U.S. 657 (1965).

[73] 325 U.S. 797 (1945).

[74] 421 U.S. 616 (1975).

[75] 381 U.S. at 660.

[76] *Id.* at 664

[77] 381 U.S. 657, 665–68 (1965). It may be fairly argued that the objective of the agreement between the union and the employers in *Pennington* was the elimination of competition in the product market. Since the N.F.L.'s draft eligibility rule does not preclude potential teams from competing with existing teams, but instead suppresses competition in a labor market, the League might argue that *Pennington* is inapposite in the instant matter. The distinction between the labor market and the product market, however, is not easily drawn. Many union activities, such as secondary boycotts, restraints on the use of new technology or restriction of supply through control of hours of work, touch upon both the product and the labor market. "The impact of wage costs on supply and price results in an inextricable connection between the two markets. As a result, the general objectives of the Sherman Act, . . . can be frustrated by monopoly powers exerted solely in the labor market." B. MELTZER, LABOR LAW, 2nd Ed. at 515. *See, e.g.*, Cordova v. Bache & Co., 321 F.Supp. 600 (S.D. N.Y. 1970). At the same time, the antitrust laws serve to protect access to employment opportunities even if secondarily to protecting the product market. Smith v. Pro Football, Inc., 420 F.Supp. at 744. Therefore, reliance on this product-labor distinction would be misplaced. Professor Leslie has flatly said, "Antitrust regulation of unions does not turn on a distinction between the product and labor markets, nor on differences between direct and indirect limitations." D. LESLIE, CASES AND MATERIALS ON LABOR LAW (1978), Teacher's Manual at 79.

[78] 325 U.S. 797 (1945).

[79] *Id.* at 809.

[80] *See* Meltzer, *Labor and Antitrust*, *supra* note 28, at 715–16; Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183 (1980(?); Weistart, *Judicial Review of Labor Agreements: Lessons From the Sports Industry*, 44 LAW AND CONTEMP. PROB., 109, 112 (1981).

[81] 421 U.S. 616 (1975).

[82] *Id.* at 625.

[83] "[A]ll of the cases in which a union agreement was found not to be exempt involved situations in which the extra-unit product market effects were the source of the objections raised." J. WEISTART & C. LOWELL, *supra* note 20, at 566.

[84] In *Jewel Tea*, part of the labor-management agreement concerned the marketing hours of the employer. At the same time, the effect of the agreement restrained only the parties to the relationship. *See* St. Antoine, *supra* note 30, at 622, n.90 (1976).

[85] *See supra* notes 83–91 and accompanying text. "It is inevitable that labor and management are required to bargain over matters that impinge directly or indirectly on the interest of stangers to the bargaining relationship." Handler & Zifchak, *supra* note 30, at 504.

[86] Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203 (1964). (subcontracting of bargaining unit work a mandatory subject of bargaining); Local 24, International Brotherhood of Teamsters v. Oliver, 362 U.S. 605 (1960) (Oliver II) (amount of rent employer will pay independent truckers a mandatory subject of bargaining); N.L.R.B. v. Columbia Tribune Publishing Co.,

495 F.2d 1384 (8th Cir. 1974) (automation of employer's process a mandatory subject of bargaining).

[87] Most favored national clauses, prevalent in the construction industry, require the union to give the employer the most favorable terms the union subsequently grants any other employer. *See* St. Antoine, *supra* note 30, at 610.

[88] Notwithstanding the language in *Pennington* that a union may not "impose a certain wage scale on other bargaining units", most-favored-nation clauses are not only permissable, but also may constitute mandatory subjects of bargaining. *See, e.g.*, Dolly Madison Indus., Inc., 182 N.L.R.B. 1037 (1970). *See also*, Associated Milk Dealers, Inc. v. Milk Drivers Local 753, 422 F.2d 546 (1970) (most-favored-nation clauses are not per se invalid under *Pennington*).

[89] St. Antoine, *supra* note 30, at 611. *See* Bartenders Union Local 355, 245 N.L.R.B. 774 (1979).

[90] A collective bargaining contract may include a provision that establishes a union-operated exclusive hiring hall. This hiring hall operates as the sole source of skilled laborers for the employer. Generally, the union hiring hall refers applicants on the basis of factors such as seniority, length of residence in the area and work experience in the trade. Hiring halls, therefore, can effectively limit competition for employment in their respective industries because these factors, rather than ability to perform the job, determine who actually gets hired. *See, e.g.*, Teamsters Local 357 v. N.L.R.B. 365 U.S. 667 (1961); Houston Chapter, Associated General Contractors 143 N.L.R.B. 409, 416 (Members Rogers & Leedom, dissenting); *see also*, Fenton, *Union Hiring Halls Under the Taft-Hartley Act*, 9 LAB. L.J. 505, 506 (1958); Jacobs & Winter, *supra* note 36, at 8; J. WEISTART & C. LOWELL, *supra* note 20, at 562–63.

[91] N.L.R.B. v. Houston Chapter, Associated General Contractors, 143 N.L.R.B. 409 (1963), *enf'd* 349 F.2d 449 (5th Cir. 1965). Both the N.L.R.B. and the Supreme Court have noted that although the exclusive hiring hall may encourage union membership, it has well served both management and labor, especially in the maritime field and in the building and construction industry where the employee is frequently a stranger to the area where the work is to be performed. *See* Teamsters v. N.L.R.B., 365 U.S. 667 (1961); Mountain Pacific Chapter, 119 N.L.R.B. 883 (1958). In these industries, the hiring hall has served "to eliminate wasteful, time-consuming and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employees." *Mountain Pacific*, 119 N.L.R.B. at 896 n.8. No similar purpose is served by the N.F.L.'s draft eligibility rule. *See infra* notes 138–40, and accompanying text.

[92] The Act compels employers and unions to negotiate regarding wages, hours and other terms and conditions of employment if demanded by either party. Section 8(a)(5) of the N.L.R.A. makes it unlawful for an employer to "refuse to bargain collectively" with the employee representative, subject to Section 9(a). 29 U.S.C. § 158(a)(5)(1976). Section 9(a) establishes that the employee representative is the exclusive representative for the purposes of collective bargaining regarding rates of pay, wages, hours of employment or other conditions of employment. 29 U.S.C. § 159(a)(1976). Section 8(d) defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment. 29 U.S.C. § 158(d). These subjects establish the outer limits of the duty to bargain and within these areas bargaining is obligatory upon demand. *See, e.g.*, N.L.R.B. v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958); Fibreboard Paper Prod. v. N.L.R.B., 379 U.S. 203 (1964); *See also*, Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950); Note, *Proper Subjects for Collective Bargaining: Ad Hoc. v. Predictive Definition*, 58 YALE L.J. 803 (1949); Rabin, *Fiberboard and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain*, 71 COLUM. L. REV. 803 (1971).

[93] See *supra* text accompanying notes 66–67. "To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they reach an agreement is to stultify the congressional scheme." *Pennington*, 381 U.S. at 711–12 (1965) (Goldberg, J., dissenting in part). *See also*, J. WEISTART & C. LOWELL, *supra* note 25, at 568; Jacobs & Winter, *supra* note 36, at 25–27.

[94] J. WEISTART & C. LOWELL, *supra* note 20, at 559–561. See especially notes 482–84 where the authors describe how the prospect of antitrust review of the Rozelle Rule dramatically influenced and impeded progress toward a contract during the 1375 N.F.L.-N.F.L.P.A. negotiations. Jacobs and Winter further argue that antitrust review of mandatory subjects would remove one subject from the package of quids and quos resulting in greater likelihood the parties would be less satisfied than if the agreement were freely reached by them and, therefore that the congressional goal of labor peace and industrial stability would be undermined. "Denying a demand to a party may thus increase the chances of a strike because it lessens the area of possible compromise without affecting the underlying strength of the parties." Jacobs & Winter, *supra* note 36 at 13. For a rebuttal, *see* SOBEL, PROFESSIONAL SPORTS AND THE LAW, 325–29 (1977).

[95] *See, e.g.*, Handler & Zifchak, *supra* note 30, at 253, 501.

[96] Teamsters v. Oliver, 358 U.S. 283, 295 (1959).

[97] *See, e.g.*, N.L.R.B. v. Insurance Agents' International Union, 361 U.S. 477, 488–90 (1960); Jacobs & Winter, *supra* note 36, at 12–13.

[98] *See* H. WELLINGTON, LABOR AND THE LEGAL PROCESS, 49–50 (1968). *See also*, *Jewel Tea*, 381 U.S. at 716–17 (Goldberg, J., dissenting).

[99] Justice Goldberg concurred in the result in *Jewel Tea* and dissented in *Pennington*.

[100] 381 U.S. at 710.

[101] *Id.* at 689.

[102] In *Jewel Tea*, the Supreme Court baldly articulated a balancing test:

"The crucial determinant is not the form of the agreement—e.g., prices or wages—but its relative impact on the product market and the interests of union members.

". . . Although the effect on competition is apparent and real, . . . the concern of union members is immediate and direct. Weighing the respective interests involved, we think the national

labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work. *Id.* at 690 n.5–91."

Thus, the Cou.' found the importance of the issue to labor to outweigh its impact on competition.

The balancing approach is persuasively supported by Professor Meltzer who stated that: "Whether any particular demand is exempt depends on weighing the interest in competition against the competing interests of the employees." Meltzer, *supra* note 30, at 724–26. Professor Weistart and Lowell agree: "It is wholly proper that attention be given to the effect of a particular provision upon business competition. But the degree of restraint must be weighted against the type of employee interest at stake." J. WEISTART & C. LOWELL, *supra* note 20 at 536. On the other hand, Professor St. Antoine suggests a serious caveat to the weighing process. St. Antoine, *supra* note 30 at 615–16.

[103] See note 142 and accompanying text *infra*.

[104] *See Mackey* 543 F.2d 606 at n.14. Professor Meltzer has observed that *Jewel Tea* teaches that "[t]he scope of [the] exemption was not coextensive with the area of mandatory bargaining. Characterization of the subjects of agreement as mandatory appears, in other words, to be a necessary but not a sufficient condition of exemption." Meltzer, *supra* note 30, at 724. *Connell*, too, appears to forecast a narrow range of protection to be accorded employee interests. In *Connell*, the union's objective was to expand employment opportunities for members. Although this purpose is of central concern to unions, the Supreme Court refused immunity. "The primary importance of the decision would seem to be in its teaching that a direct, unmitigated market restraint will be sustained only where it is necessary to protect the most fundamental of employee interest." J. WEISTART & C. LOWELL, *supra* note 20, at 539. As we have argued, in the matter of Walker, the unmitigated restraint on entry to employment far outweighs the importance of the employee interests at stake.

[105] 29 U.S.C. § 158(d) defines "bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment." *Id.*

[106] 28 U.S.C. § 158(a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(A)." *Id.*

[107] 29 U.S.C. § 159(a) states: "Representatives designated or selected for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ." *Id.*

[108] *Id.*

[109] Allied Chemical and Alkali Workers of America, Local 1 v. Pittsburgh Plate Glass Co. Chemical Div., 404 U.S. 157, 164 (1971), and cases cited therein.

[110] *Id.*

[111] *Pittsburgh Plat Glass*, 404 U.S. at 166. The term "employee" is defined, unhelpfully, by reference to itself. Section 2(3) of the Act provides:

"The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. 29 U.S.C. § 152(3) 1976."

See Pittsburgh Plat Glass, 404 U.S. at 165. There was potent support for this conclusion. In 1944, in N.L.R.B. v. Hearst Publications, 322 U.S. 111 (1944) the Supreme Court had sustained the Board's finding that newsboys were "employees" rather than independent contractors. The Court affirmed the Board's conclusion and stated that Congress intended "a wider field than the narrow technical legal relation of 'master and servant' as the common law had worked out in all its variations . . ." *Id.* at 124. Congress reacted to *Hearst* in 1947 by specifically excluding from the definition of "employee," "any individual having the status of independent contractor." The House report of the Taft-Hartley Act explained:

"An 'employee,' according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, . . . means someone who works for another for hire . . . . It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the Act, not new meanings that, nine years later, the Labor Board might think up . . . 'Employees' work for wages or salaries under direct supervision . . . It is inconceivable that Congress, when it passed the Act, authorized the Board to give to every work in the Act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not farfetched meanings but ordinary meanings. H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947)."

[112] 404 U.S. at 168. *See generally* C. MORRIS, *supra* note 42 at 207, 772.

[113] 29 U.S.C. § 159(a)(1976). R. GORMAN, LABOR LAW, (1976) at 379; *Pittsburgh Plate Glass*, 404 U.S. at 171.

[114] To determine whether a "community of interest" exists among groups of employees, the Board looks to factors such as:

(1) similarity in the scale and manner of determining earnings; (2) similarity in employment benefits, hours of work and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skills and training of the employees; (5) frequency of contact or interchange among the employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) desires of the affected employees; (12) extent of union organization.

R. GORMAN, *supra* note 113, at 69. *See* 15 N.L.R.B. Ann. Rep. 39 (1950); C. Morris, *supra* 42, at 217.

[115] Kalamazoo Paper Box Corp., 136 N.L.R.B. 134, 137 (1962); *Pittsburgh Plate Glass*, 404 U.S. at 172-73; R. GORMAN, *supra* note 113, at 379.

[116] *Pittsburgh Plate Glass*, 404 U.S. at 173. The Court pointed to previous N.L.R.B. cases in which retirees had been excluded from a petitioned-for unit. *See, e.g.*, Public Service Corp. of New Jersey, 72 N.L.R.B. 224, 229-30 (1947); J.S. Young Co., 55 N.L.R.B. 1174 (1944). The Court recognized the common concern of active and retired employees in assuring that the latter's benefits remained adequate, but also noted that the union might see fit to bargain for improved wages or other conditions at the expense of retirees' benefits. *Pittsburgh Plate Glass*, 404 U.S. at 173.

[117] Retirees in *Pittsburgh Plate Glass* were similarly found ineligible to vote. 404 U.S. at 174. Moreover, the N.L.R.B. has consistently held "that for one to be able to vote in a representation election, the person must be employed during the established payroll eligibility period and must also be employed on the day of the election." Macy's Missouri-Kansas Div. v. N.L.R.B., 389 F.2d 835, 842 (8th Cir. 1968). *See* Gulf States Asphalt Co., 106 N.L.R.B. 1212 (1953).

[118] *Pittsburgh Plate Glass*, 404 U.S. at 175. As the Court recognized, this principle does not go so far as to preclude the N.L.R.B. from establishing reasonable regulations governing Board-conducted elections. For example, the Board may legitimately deny a ballot to employees hired after the eligibility cut-off date. *Id.* at 175 n.15. *See also, Pittsburgh Plate Glass* 177 N.L.R.P. 911, 919, *enforcement denied* 427 F.2d 936 (6th Cir. 1970) *aff'd* 404 U.S. 157 (1971) (dissent of Member Zagoria).

[119] *See supra* text accompanying notes 92, 95-98. *Cf. Pittsburgh Plate Glass*, 404 U.S. at 181-83.

[120] During consideration of the Taft-Hartley amendments to the N.L.R.A., the House Bill contained an actual list of mandatory subjects of bargaining. *See* H.R. 3020 § 2(11), 80th Cong., 1st Sess. (1947) *reprinted* in 1 N.L.R.B., LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 31, 40 (1948). Congress rejected this approach in favor of continuing to vest the N.L.R.B. with prwer to define mandatory subjects of bargaining on a case-by-case basis. *See* First National Maintenance Corp. v. N.L.R.B., 452 U.S. 666, 676 n.14 (1981); *See also*, McCormick, *Union Representatives as Corporate Directors: The Challenge to the Adversarial Model of Labor Relations*, 15 U. MICH. J.L. REF. 219, 227-28 n.42 (1982).

[121] "In general terms, the limitation [in § 8(d)] includes only issues that settle on aspect of the relationship between the employer and employees." *Pittsburgh Plate Glass*, 404 U.S., at 178 R. GORMAN, LABOR LAW, *supra* note 113, at 523. *Cf.* N.L.R.B. v. Borg-Warner Corp., 356 U.S. 342 (1958).

[122] R. GORMAN, LABOR LAW, *supra* note 113, at 523.

[123] 404 U.S. at 178. *See* R. GORMAN, LABOR LAW, *supra* note 113, at 528-29.

[124] *Pittsburgh Plate Glass*, 404 U.S. at 179. "As a result, the employer may be required to bargain about payments to third persons which directly threaten the wages of unit employees or subcontracting to third parties." R. GORMAN, LABOR LAW, *supra* note 113, at 529. *See also*, U.M.W. (Lone Star Steel Co. and Surface Industries, Inc.) 231 N.L.R.B. 573 (1978). There, the Board determined that a successorship clause was a mandatory subject to bargaining because "agreement . . . on this issue would vitally affect terms and conditions of employment of employees who survived the change in ownership." *Id.* at 575.

[125] 358 U.S. 283 (1959).

[126] 358 U.S. at 294. *Cf.* United States v. Drum, 368 U.S. 370, 382-83 n.26 (1962).

[127] 379 U.S. 203 (1964).

[128] 404 U.S. at 180.

[129] *Id.* The Court recognized that active employees might benefit by the inclusion of retired employees under the same health insurance contract as active employees because adding persons to the group generally tends to lower the overall rates for coverage. The Court, nevertheless, found this impact to be "[s]peculative and insubstantial at best." *Id.* The N.L.R.B. in *Pittsburgh Plate Glass* had also observed that "changes in retirement benefits for retired employees affect the availability of employer funds for active employees." 177 N.L.R.B. at 915. The Court answered that this impact on active employees was, as well, "too insubstantial" to render the subject a matter of compulsory negotiation. 404 U.S. at 176-77, n.17.

[130] Phelps-Dodge Corp. v. N.L.R.B., 313 U.S. 177, 182-87 (1941).

[131] Local 872, Int'l Longshoremen's Assoc. (Isaac Morning), 163 N.L.R.B. 586 (1967).

[132] Houston Chapter Assoc. Gen. Contractors, 143 N.L.R.B. 409 (1963) *enf'd.* 349 F.2d 449 (5th Cir. 1965), *cert. den.* 382 U.S. 1026 (1966).

[133] *Phelps-Dodge*, 313 U.S. at 185. *See* Atlantic Maintenance Co., 305 F.2d 604 (3rd Cir. 1962) (an employer's discriminatory refusal to hire an applicant is a violation despite the employer arguing that persons must be "employees" to come within the Act's protection). *See also*, Local 872, Int'l Longshoremen's Assoc. (Isaac Morning) 163 N.L.R.B. 586 (1967).

[134] *See supra* text accompanying note 118.

[135] *See supra* text accompanying notes 113-18. Two N.L.R.B. members have stated: "Although the Court [in *Phelps-Dodge*] held that the Act protects applicants for employment against discrimination in the hiring process, that case by no means stands for the proposition that prospective employees are employees as to whom bargaining is mandatory under Section 8(d)." Houston Chapter, Assoc. Gen. Contractors, 143 N.L.R.B. 409, 417 (1963) *enf'd* 359 F.2d 449 (5th Cir. 1965), *cert. denied* 382 U.S. 1026 (1966) (dissent of Members Rogers and Leedom).

[136] 143 N.L.R.B. 409 (1963, *enf'd* 359 F.2d 449 (5th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966).

[137] *Id.* at 412.

[138] *Id.*

[139] The court of appeals in *Houston Chapter* also placed great emphasis on the factual setting for the hiring hall demand. They found that:

"The record here discloses that employment in the construction trade is transitory in nature, with employees moving from job to job and employer to employer. The nature of the employment does not lend itself to employee security through seniority rights. The proposal of the union was to establish a system of seniority rights and job priority through the use of the nondiscriminatory hiring hall. 349 F.2d at 452."

N.L.R.B. v. Tom Joyce Floors, 353 F.2d 768 (9th Cir.) (1965), found hiring halls to be a mandatory subject of bargaining for the same reason.

[140] The average playing career of an N.F.L. player is 4.6 years. N.F.L.P.A. "Why a Percentage of the Gross?" Sept. 1981, at 4. In 1981, of 137 players who were free agents, none were signed by a different team. Since 1977, a total of 510 players have been free agents. Six have been signed by new teams. *Id.* at 34.

[141] Local 357, Int'l Brotherhood of Teamsters v. N.L.R.B., 365 U.S. 667, ——— (1961). In the unlikely event the draft eligibility arrangement were viewed as being sufficiently like a hiring hall to make the issue a mandatory subject of bargaining, the arrangement would necessarily be analogized to an exclusive hiring hall. It is well established that a union violates Sections 8(b)(1)(A) and 8(b)(2) of the N.L.R.A. when it operates a hiring hall upon unreasonable, arbitrary or capricious considerations. *See, e.g.*, Laborers, Local 282 (Millstone Constr. Co.), 236 N.L.R.B. 621 (1978), Teamsters Local 174 (Totem Beverages, Inc.) 226 N.L.R.B. 690 (1976); Int'l Assoc. Bridge Workers, Local 433 (The Assoc. Gen. Contractors of California, Inc.) 228 N.L.R.B. 1420, (1977) *enf'd* 600 F.2d 770 (9th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980); Painters Local 1555 (Alaska Constr. Inc.), 241 N.L.R.B. 741 (1979); Journeymen Pipe Fitters Local 392 (Kaiser Engineers), 252 N.L.R.B. 417 (1980). The requirements of the draft eligibility rule are wholly irrelevant to the successful performance of the job of a professional football player. Therefore, considerations such as those embodied in the draft eligibility rule would be outside those upon which the union could necessarily exclude applicants.

[142] For example, in *Local 164 Painters of America*, (A.D. Cheatham Company) 126 N.L.R.B. 997, *enf'd* 293 F.2d 133 (D.C. Cir. 1961) *cert. den.*, 368 U.S. 824 (1961) the Board considered the question whether a union proposal that the employer post a performance bond was a mandatory subject of bargaining. The Board decided that it was misleading to say that a condition precedent to employment is a condition of employment, such as wages and hours, in the meaning of the statute. 126 N.L.R.B., at 1002.

[143] 543 F.2d at 613 (1976).

[144] *Id.* at 616.

[145] *Id.* at 610–13.

[146] *Id.* at 616.

[147] 460 F.Supp. at 910–11.

[148] *Id.*

[149] 600 F.2d at 1202.

[150] *Id.* at 1202 n.12.

[151] *Id.* at 1203.

[152] Conversation between R. McCormick and Richard A. Berthelsen, Assistant Exec. Dir. N.F.L.P.A. January 9, 1982. According to Berthelsen, discussion of the draft eligibility rule had been specifically excluded from collective negotiations. At the same time, however, the Preamble to the 1977 agreement between the N.F.L. and the N.F.L.P.A. states: "Whereas, the N.F.L.P.A. and the management Council mutually acknowledge that this agreement is the product of bona fide, arm's-length collective bargaining."

[153] Indeed, in Supreme Court cases, the unions and not the employers had initially proposed and bargained for the adoption of the challenged restraints. *See, e.g. Jewel Tea*, 381 U.S. 676 (1965); *Connell* 421 U.S. 616 (1975). *See also*, Weistart, *supra* note 77, at 114.

[154] *See e.g.*, Smith v. Pro Football, Inc., 420 F.Supp. 738 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978); Mackey v. N.F.L., 407 F.Supp. 1000 (D. Minn. 1975), *aff'd in part, rev'd in part* 543 F.2d 606 (8th Cir., 1976) *cert. denied*, 434 U.S. 801 (1977); Robertson v. N.B.A. 389 F.Supp 867 (S.D. N.Y. 1975); McCourt v. California Sports, Inc. 460 F.Supp. 904 (E.D. Mich. 1978) *vacated*, 600 F.2d 1193 (6th Cir. 1979); Philadelphia World Hockey Club, Inc. 351 F.Supp. 462 (E.D. Pa. 1972); Reynolds v. N.F.L. 584 F.2d 280 (8th Cir. 1978); Flood v. Kuhn 407 U.S. 258 (1972) (Marshall, J., dissenting).

[155] 351 F.Supp. 462 (E.D. Pa. 1972).

[156] The court enjoined the National Hockey League from bringing actions against players on member clubs who sought to join the new league. *Id.* at 519.

[157] 351 F.Supp. at 485. The court found that the players' association had not received any trade-offs in return for an agreement to maintain the clause and that although the players' association had requested a modification in the reserve clause, neither side had modified its position. The court noted that in Supreme Court cases, a grant of immunity had followed actual collective bargaining and held that such immunity in this case failed for want of "serious, intensive, arm's-length collective bargaining." *Id.* The court also took note that in all Supreme Court cases addressing the labor exemption, the putative restraint had been sought by the union while here the union opposed the matter.

[158] 389 F.Supp. 867 (S.D. N.Y. 1975).

[159] *Id.* at 866.

[160] *Id.* at 886 (quoting *Philadelphia World Hockey*, 351 F.Supp. at 499–500).

[161] 351 F. Supp. 462, 498–99 (E.D. Pa. 1972).

[162] J. WEISTART & C. LOWELL, *supra* note 20, at 573.

[163] In United States v. Hutcheson, 312 U.S. 219 (1941) the Court held that the labor exemption immunized a union from antitrust liability for certain secondary boycott activities "so long as the union acts in its self interest" and does not conspire with non labor groups. *Id.* at 232. *Hutcheson* has "had significant effect in cementing the notion that the promotion of employee interests was a critical ingredient in the grant of the exempton." Weistart, *supra* note 77, at n.30.

[164] N.L.R.B. v. Wooster Div. of Borg-Warner, 356 U.S. 342 (1958); First National Maintenance Corp. v. N.L.R.B., 452 U.S. 666 (1981).

[165] *See, e.g.*, N.L.R.B. v. Reed & Prince Mfg. Co. 205 F.2d 131 (1st Cir.) *cert. denied* 346 U.S. 887 (1953).

[166] *See, e.g.*, N.L.R.B. v. Truitt Mfg. Co. 351 U.S. 149 (1956).

[167] *See generally*, Krasnow & Levy, *Unionization and Professional Sports*, 51 Geo. L.J. 749 (1963).

[168] United States v. Women's Sportswear Mfg. Ass'n 336 U.S. 460, 464 (1948).

[169] Professor Weistart has argued, "If the parties to the disputed agreement have a long-standing and well-established bargaining relationship . . . it is difficult to imagine the justification for questioning the effectiveness of either sides' consent to a particular term in a particular negotiation." Weistart, *supra* note 77, at 128–29.

[170] *Id.*

[171] Standard Oil Co. v. United States, 221 U.S. 1, 58–60 (1911). The Court said:

"[T]he dread of enhancement of prices . . . which . . . would flow from the undue limitaton on competitive conditions caused by contracts or other acts . . . led . . . to the prohibition . . . [of] all contracts or acts which were unreasonably restrictive of competitive conditions, either from the[ir] nature . . . or where . . . the[y] had not been entered into or performed with legitimate purpose of reasonably forwarding personal interest and developing trade . . . *Id.*"

[172] Gardella v. Chandler, 172 F.2d 402, 408 (2d. Cir., 1949) (opinion by L. Hand.)

[173] Typical examples are: (1) reserve and option clauses, (2) the draft and (3) no-tampering rules. *See generally*, J. WEISTART & C. LOWELL, *supra* note 20, at 590–94.

[174] Denver Rockets v. All-Pro Management, Inc., 325 F.Supp. 1049 (C.D. Cal. 1971) (N.B.A's version of the Four-Year Rule declared illegal); Kapp v. National Football League, 390 F.Supp. 73 (N.D. Cal. 1974), *aff'd* 586 F.2d 664 (9th Cir. 1978). *cert. denied* 441 U.S. 907 (1979) (Group boycott of quarterback Joe Kapp for refusing to sign standard player contract held illegal); Bowman v. National Football League, 402 F.Supp. 754 (D. Minn. 1975) (league resolution which prevented players from the defunct W.F.L. from signing contracts with N.F.L. teams until the season ended declared illegal); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) *cert. denied* 434 U.S. 801 (1977) (Rozelle Rule, which required compensating a player's former employer if he signed with another team, was struck down on the ground that it deterred clubs from signing free agents); Smith v. Pro Football, Inc., 420 F.Supp. 738 (D.D.C. 1976) *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978) (N.F.L. player draft, as it existed in 1968, struck down); Linesman v. World Hockey Association, 439 F.Supp. 1315 (D. Conn. 1977) (league rule declaring that players younger than twenty years of age were not eligible for the N.H.L. draft was struck down).

[175] 15 U.S.C. § 1 (1980). This section states that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." *Id.*

[176] *Standard Oil*, 221 U.S. at 58–60. In this case there was not reason to engraft upon Section 1 of the Sherman Act a qualification of reasonableness. Standard Oil controlled almost 90% of the nation's refining capacity. It had achieved this position by employing business practices which could not be justified as normal competitive practices. It had coerced railroads into granting it preferential rates, engaged in local price discrimination and business espionage, and committed other vicious acts intended to force local competitors out of business. Chief Justice White went beyond these clear facts and attempted a lengthy, and for this case unnecessary, statutory explication resulting in the rule of reason. *Id.*

[177] The test of legality is whether the restraint imposed merely regulates or promotes competition, or suppresses or destroys competition. To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint and its actual or probable effect. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy and the purpose or end sought to be attained, are all relevant facts. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

[178] In United States v. Trenton Potteries Co., 273 U.S. 392 (1927) the defendents, who controlled 82% of the market, had formed a cartel which fixed prices and limited sales to specified jobbers. Defendents were convicted in a criminal case. The court of appeals reversed, holding incorrect an instruction to the jury that if they found price fixing they should not consider whether or not the prices fixed were reasonable. The Supreme Court reinstated the verdict. In an opinion by Mr. Justice Stone, it ruled that the trial court had been right, saying:

"The aim and result of every price fixing agreement, if effective, is the elimination of one form of competition. . . . The reasonable price fixed today may through economic or business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement. . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable." . . . *Id.* at 397.

Read literally, the cases hold that proof of the mere existence of a price-fixing agreement establishes defendant's illegal purpose and that the prosecution need show nothing further. *See also* Northern Pac. Ry. United States, 356 U.S. 1, 5 (1958).

[179] United States v. Socnoy-Vacuum Oil Co., 310 U.S. 150 (1940); Albnecht v. The Herald Co., 390 U.S. 145 (1968); Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

[180] Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1931); United States v. Topco Assoc., 405 U.S. 596 (1972).

[181] Klor's Inc. v. Broadway-Hale Stores, Inc., 349 U.S. 207 (1959); Fashion Originators' Guild v. F.T.C., 319 U.S. 457 (1941); United States v. General Motors, 384 U.S. 127 (1966).

[182] International Salt Co. v. United States, 332 U.S. 392 (1947); United States Steel Corp. v. Fortner, 429 U.S. 610 (1977).

[183] L. Sullivan, *supra* note 31, at 230, 261 (1977).

[184] 282 U.S. 30 (1930).

[185] *Id.* at 43. Any doubt about whether a per se approach was being used in these cases was dispelled when the Court said: "The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed reconciliation of its policy with the good intention of parties, and, it may be, of some good results." Standard Sanitary Mfg. v. United States, 226 U.S. 20, 49 (1912).

[186] 312 U.S. 457 (1941).

[187] 312 U.S. at 468.

[188] *Id.* at 468.

[189] 359 U.S. 207 (1959).

[190] *Id.* at 212. Here, a large department store used its economic power to coerce then national appliance manufacturers and their distributors to stop selling to a competing appliance store.

[191] United States v. General Motors Corp., 384 U.S. 127 (1966).

[192] 373 U.S. 341 (1963). Silver was a securities dealer in Dallas, Texas. His firm was not a member of the New York Stock Exchange. Initially, the New York Stock Exchange gave "temporary approval" to Silver to establish direct private telephone connections to several N.Y.S.E. member firms as well as stock ticker service directly from the floor of the Exchange in New York City. Subsequently, without prior notice to Silver, the N.Y.S.E. decided to disapprove these connections and instructed its member firms to disconnect the lines to Silver.

[193] *Id.* at 348–49.

[194] Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260, 1266–67 (N.D. Ga. 1973), (the suspension of the plaintiff for alleged cheating was declared unlawful per se because players excluded a rival from the market and thus effected "a naked restraint of trade through defendant's completely unfettered, subjective discretion.") *See also,* L. Sullivan, *supra* note 31, at 247.

[195] J. Weistart & C. Lowell, *supra* note 20, at 599; *See also* Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

[196] *See* United States Trotting Ass'n v. Chicago Down Ass'n, 487 F. Supp. 1003 (N.D. Ill. 1980); Linesman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977); (injunction reinstated sub nom. Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971). *See also* Comment, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason,* 66 Colum. L. Rev. 1486 (1966).

[197] *See* North American Soccer League v. National Football League, 505 F. Supp. 659 (S.D. N.Y. 1980) *aff'd in part, rev'd in part,* 670 F.2d 1249 (2d. Cir. 1982). *See also,* Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978) Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) *cert. denied,* 434 U.S. 801 (1977); Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd on other grounds,* 586 F. 2d 644 (9th Cir. 1978), *cert. denied* 441 U.S. 907 (1979); Deesen v. Professional Golfer's Ass'n, 358 F. 2d 165 (9th Cir. 1966) *cert. denied,* 385 U.S. 846 (1966).

[198] *See* L. Sullivan, *supra* note 31, at 299–33; Coons, *Non-Commercial Purpose as a Sherman Act Defense,* 56 Nw. U. L. Rev. 705 (1966); Comment, *Player Control Mechanisms in Professional Sports,* 34 U. Pitt L. Rev. 645 (1973).

[199] L. Sullivan, *supra* note 31, at 229–33.

[200] The desired end can be achieved in a number of ways. For example, boycotting wholesalers may exclude from the wholesale level manufacturers or retailers seeking to integrate vertically. Or, a group such as brokers may seek to protect themselves from competition from non-group members by concertedly ceasing to deal with them. Sometimes boycotters threaten one or more suppliers or customers to stop dealing with the boycott target. *Id. at 230–31.*

[201] 379 U.S. 341 (1963).

[202] *Id.* at 365–66.

[203] *Id.* at 347.

[204] *Id.* at 347.

[205] *See* L. Sullivan *supra* note 31 at 256–60

[206] Comment, *supra* note 198.

[207] Purpose should be differentiated from intent. A group's purpose is its ultimate goal, while its intent is its immediate goal. Thus, in a group of private citizens who agree to withdraw their patronage from those theatres which show X-rated movies, for example, their purpose would be to promote public morality and their intent would be to bring economic sanctions upon those owners who show X-rated movies. *Id.* at 657–78.

[208] At least as regards the services of football players, there is no doubt that the teams are competitors. *See North American Soccer League,* 505 F. Supp. 659 (S.D. N.Y. 1980). Professor Coons observes that "in any case involving businessmen acting with reference to their business, the Court will disregard any oddment of non-commercial purpose." Coons, *supra* note 198, at 727.

[209] *See infra* notes 241–43 and accompanying text.

[210] *See infra* notes 250–52 and accompanying text.

[211] *See infra* text accompanying note 244.

[212] In Radiant Burners v. Peoples Gas, Light and Coke Co., 364 U.S. 656 (1961), for example, the defendant operated a testing laboratory for gas appliances and refused to give its "seal of approval" to an appliance found to be safe. Citing *Klor's,* the Supreme Court held that the denial of the seal fell within the per se rule. The Court found that competitors of plaintiff had influenced the association and caused it to withhold approval of plaintiff's burner by using tests not based on objective standards. *Id.* at 659–60.

[213] 593 F.2d 1173 (D.C. Cir. 1978), *aff'd in part, rev'd in part,* 593 F.2d 1173 (D.C. Cir. 1978). In this case, Smith challenged the legality of the N.F.L. player chart as it existed in 1968. Basical-

ly, he claimed that but for the draft he would have negotiated a far more lucrative contract if he could have negotiated with any of the N.F.L. teams rather than only with the team who drafted him.

The Court found that the draft violated Section 1 of the Sherman Act holding that the draft had an anti-competitive impact on the market for players services and that the draft's allegedly pro-competitive effect upon playing filed equality among teams did not encourage competition in the economic sense. *Id.* at 1187-89.

[213] *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-89 n.17 (1975) where the Court stated that:

"The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the profession's antitrust concepts which originated in other areas. The public service aspect, and other features of the profession, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."

[214] In *North American Soccer League* the court stated:

"If member teams of a professional sports league compete with each other in an identifiable market, § 1 of the Sherman Act applies; the legality of restraints on such competition is judged by the rule of reason . . . Thus the single economic entity fails in the player contract restriction cases, where all member teams compete with each other for players, and league restraint of that competition damages the players . . . 505 F.Supp. 659, 677 (S.D. N.Y. 1980) *aff'd in part, rev'd in part,* 670 F.2d 1249 (2d Cir. 1982)."

[215] National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 688 (1980).

[216] *Id.* at 688.

[217] *Id.* at 690.

[218] *Id.* at 692.

[219] *Id.* at 691 (quoting Chicago Bd. of Trade v. United States, 426 U.S. at 238).

[220] 593 F.2d at 1189.

[221] *Id.* at 1187.

[222] *Id.* at 1188.

[223] The Court stated that:

"[U]nder the Supreme Court's decision in *Professional Engineers*, no draft can be justified merely by showing that it is a relatively less anticompetitive means of attaining sundry benefits for the football industry and society. Rather, a player draft can survive scrutiny under the rule of reason only if it is demonstrated to have positive, economically *procompetitive* benefits that offset its anticompetitive effects, or, at the least, if it is demonstrated to accomplish legitimate business purposes and to have a net anticompetitive effect that is *insubstantial*."

[224] *See, e.g.,* Flood v. Kuhn, 309 F.Supp. 793, 801 n.26 (S.D. N.Y.) *final* decision, 316 F.Supp. 271 (S.D. N.Y. 1970), *aff'd,* 443 F.2d 264 (2d. Cir 1971), *aff'd,* 407 U.S. 258 (1972); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F.Supp. 462 503-04 (E.D. Pa. 1972).

[225] Mackey v. National Football League, 407 F.Supp. 1000 (D. Minn. 1975), *aff'd in part, rev'd in part,* 543 F.2d 606 (8th Cir. 1976) *cert. denied* 434 U.S. 801 (1977); Robertson v. National Basketball Ass'n, 389 F.Supp. 867 (S.D. N.Y. 1975); Kapp v. National Football League, 390 F.Supp. 73 (N.D. Cal. 1974) *aff'd on other grounds,* 586 F.2d 644 (9th Cir. 1978) *cert. denied* 441 U.S. 907 (1979). Denver Rockets v. All-Pro Management, 325 F.Supp. 1049 (C.D. Cal. 1971).

[226] Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir., 1978), Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) *cert. denied* 434 U.S. 801 (1977); McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979).

[227] Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 n.22 (D.C. Cir. 1978).

[228] 435 U.S. 679, at 691.

[229] *See supra* text accompanying note 192-96.

[230] 313 U.S. at 355-56.

[231] 325 F.Supp. 1049 (C.D. Cal. 1971).

[232] 493 F.Supp. 1315 (D. Conn. 1977). Although the Court did not specifically use the words per se in its opinion it is clear that this approach was employed since on cases which were decided under the per se doctrine were cited by the court.

[233] 325 F.Supp. at 1066.

[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] 439 F.Supp. at 1322.

[239] *Id.*

[240] In *Kapp,* the court noted that the Justice Department acknowledged that professional sports teams needed some joint agreements to assure continued viability, and also that Congress had, through various actions, recognized this need. 390 F.Supp. at 79 n.3, 80 n.4 *See also Mackey,* 543 F.2d at 619 (1976) *cert. denied* 434 U.S. 801 (1977).

[241] Comment, *Herschel Walker v. National Football League: A Hypothetical Lawsuit Challenging the Propriety of the National Football League's Four-or-Five Year Rule Under the Sherman Act,* 9 PEPPERDINE L. REV. 603, 631 (1982).

[242] In *Smith,* the Court affirmed the district court's finding that there was no correlation between the draft and maintaining competitive balance. 593 F.2d at 1183.

[243] Molinas v. National Basketball Assoc., 190 F.Supp. 241, 244 (S.D. N.Y. 1961).

[244] S. GALLNER, PRO SPORTS: THE CONTRACT GAME, 5-6 (1974).

[244a] Most college coaches reacted with anger when Walker turned pro. U.S.A. Today, February 24, 1983, at 3C.

[245] Typical budgets for "big ten" colleges:

Seven big-ten budgets, 1976–77

Schools:	*Men's athletics*
Indiana	$3,500,000
Iowa	2,000,000
Michigan	5,000,000
Michigan State	4,500,000
Minnesota	3,400,000
Ohio State	5,700,000
Wisconsin	2,217,000
Average	3,759,714

Comment, *Title IX and Intercollegiate Athletics: HEW Gets Serious About Equality in Sports?* 15 NEW ENG. 573, 591 (1981).

[246] For example, Digger Phelps, Notre Dame basketball coach, stated that a number of colleges across the country are paying a standard rate of $10,000 a year to outstanding players. Detroit Free Press, March 26, 1982, at 2-D.

[247] Waucukauski, *The Regulating of Academic Standards in Intercollegiate Athletics*, 1982 ARIZ. ST. L. J. 79 (1982).

[248] 439 F.Supp. at 1322.

[249] Fewer than eight players a year have turned professional since the N.B.A. rule was abolished in 1976. Kirkpatrick, *supra* note 4, at 36.

[250] The seriousness of the violence problem can best be analyzed through injury statistics. From 1969–1974, N.F.L. players suffered an estimated 5,110 injuries. A follow-study of serious sports injuries reported that serious football injuries in 1974 increased 25% over the previous season. During that year, a survey of N.F.L. team trainers revealed that injuries incerased to an estimated record 1,638. That is, 12 injuries for every 10 players. R. HARROW, SPORTS VIOLENCE, 7–8 (1980).

[251] In Neeld v. National Hockey League, a one-eyed player challenged a league rule preventing him from competing in the League. The court found that the rule's primary purpose was the promotion of safety and that there was no anti-competitive purpose. 594 F.2d 1297 (9th Cir. 1979).

[252] While this point was not expressly addressed in *Linesman*, it appears that the court, by implication, has rejected such an argument since it struck down the National Hockey League's 20 year old rule allowing a 19 year old player to compete. 439 F.Supp. 1315 (D. Conn. 1977).

[253] *See supra* note 198.

[254] NATIONAL FOOTBALL LEAGUE, CONSTITUTION AND BY-LAWS FOR THE NATIONAL FOOTBALL LEAGUE, Art. VIII § 8.14(A).

[255] L. SOBEL, *Supra* note 51, at 466 (1977).

[256] *Id.*

[257] *All-Pro* 325 F.Supp. 1049 (C.D. Cal. 1971). *See also* Cooney v. American Horse Shows Association, 495 F.Supp. 424, 430 n.3 (S.D. N.Y. 1980).

[258] *All-Pro*, 325 F.Supp. 1049 (C.D. Cal. 1971).

[259] *Id.* at 1066.

[260] *Id.*

[261] National Soc'y of Professional Engineers v. United States, 435 U.S. at 691 (quoting Chicago Bd. of Trade v. United States, 246 U.S. at 238).

[262] *Smith*, 593 F.2d at 1183.

[263] *Id.* at 1179; *Mackey*, 543 F.2d at 621; *Kapp*, 390 F.Supp. at 79.

[264] *Smith*, 593 F.2d at 1183.

[265] *Id.* at 1088.

[266] *Id.* at 1089.

[267] This contention was summarily dismissed in *Linesman* and *All-Pro* where the per se approach was used. *Linesman*, 439 F.Supp. at 1322; *All-Pro* 325 F.Supp. at 1066.

[268] Information Please Almanac, 35th ed., 1981, at 755.

[269] *See supra* note 4, at 36.

[270] *See supra* note 246.

[271] During the 1960's some stronger clubs drafted "red shirts" (college players who did not play in a particular year but who were eligible to play in the future). By doing this, they could stockpile future players. *Hearings on H.R. 2355 and H.R. 694 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 51 (1975) (testimony of Pete Rozelle, Commissioner, National Football League.)

[272] Both because of injury and age, the average career of an N.F.L. player is only 4.6 years. R. HARROW, *supra* note 250, at 9.

[273] In *Linesman* the court stated that the plaintiff hockey player would suffer irreparable injury if he were prevented from playing for even one year. 439 F.Supp., at 1319.

[274] *See supra* note 14 and accompanying text.

[275] 593 F.2d at 1185.

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